COURT OF APPEALS
DECISION
DATED AND FILED

May 12, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-3569-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JEFFREY J. GRASSL,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Marathon County: VINCENT K. HOWARD, Judge. *Affirmed.*

CANE, P.J. Jeffrey Grassl appeals from a conviction after a jury trial for misdemeanor damage to property and from an order denying his postconviction motion. He contends the trial court erred by excluding evidence of the victim's prior conduct and by improperly shifting the burden of proof when giving an additional instruction to the jury on the element of intent. He also contends that by excluding the prior conduct evidence, the trial court violated his

constitutional right to present evidence, as well as being denied effective assistance of counsel when counsel did not object to the jury instructions. This court rejects Grassl's arguments and, therefore, affirms the order and conviction.

The criminal charge arose from an earlier event when Grassl and Dennis Leick were driving their cars and had a near accident. Both Grassl and Leick blamed each other for the near collision, and Grassl became angry when gravel from Leick's car struck and cracked the windshield of his car. Each driver expressed an agitated distaste for the other over the next several minutes. Leick testified that he then drove to Mosinee where he suddenly observed Grassl standing on the side of his traffic lane while facing him in a baseball stance and holding a pipe. Leick claimed that because there were other cars in the oncoming lane, he could not swerve to avoid Grassl and he, therefore, swerved a little bit toward Grassl, hoping that he would jump back. Instead, Grassl stepped toward the car and struck out the right front passenger side of the car's windshield with the pipe.

On the other hand, a witness supported Grassl's version. She testified that Grassl was on the right side of the road, with the pipe in his left hand while gesturing with his right hand for Leick to stop his vehicle. She said that Leick's car swerved toward Grassl, causing him to raise his left hand with the pipe and, in an attempt to ward off the approaching car, struck the windshield. Grassl argued that this act was in self-defense. The jury found Grassl not guilty of endangering the safety of Leick and his female passenger, but guilty of misdemeanor damage to property.

Prior to trial, Grassl moved for the admission of evidence relating to an incident two years earlier when Leick had a verbal confrontation with some

people in a parking lot, and then, when leaving the lot, swerved his vehicle toward them. Some of the people were hit and reported the incident to the police. As a result of that incident, Leick was convicted of failure to report an accident. Grassl argued this evidence would refute Leick's claim that he turned his steering wheel only slightly in an attempt to make Grassl step back. He also argued the evidence was admissible to show Leick's habit or routine when confronted with a hostile situation. The trial court refused to admit the evidence.

Grassl submits two theories for the admission of this other act evidence. First, he argues the evidence is admissible under § 904.04(1)(b), STATS., which provides that "evidence of a pertinent trait of character of the victim of the crime offered by the accused," and § 904.05(2), STATS., which provides that "In cases in which character or a trait of character of a person is an essential element of a … claim, or defense, proof may also be made of specific instances of the person's conduct." Second, he claims the evidence is admissible under § 904.06, STATS., since the evidence tends to establish a habit or routine of Leick when confronted with what appears to be a hostile situation.

Whether to admit evidence is addressed to the trial court's discretion. ***State v. Pharr***, 115 Wis.2d 334, 342, 340 N.W.2d 498, 501 (1983). An appellate court will sustain an evidentiary ruling if it finds that the circuit court examined the relevant facts, applied a proper standard of law and, using a demonstrative rational process, reached a conclusion that a reasonable judge would reach. ***Loy v. Bunderson***, 107 Wis.2d 400, 414-15, 320 N.W.2d 175, 184 (1982).

Pursuant to § 904.04, STATS., and subject to specified exceptions, evidence of a person's character or character trait is not admissible for the purpose

of proving the person acted in conformity with that character or trait.[1] The exceptions to this general rule are dependent on the status of the person whose character is at issue. Here, we are dealing with the victim whose character is at issue.

Evidence of a pertinent character trait is admissible under § 904.04(1)(b), STATS., to show the victim acted in accordance with that trait. This subsection, however, does not authorize the admission of specific instances of conduct for that purpose. *See* ***State v. Evans***, 187 Wis.2d 66, 76-80, 522 N.W.2d 554, 557-59 (Ct. App. 1994). Therefore, the specific act was not admissible under § 904.04(1)(b).

Section 904.05(2), STATS., allows specific instances of conduct for issues other than character, such as to establish the defendant's state of mind in

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[1] Section 904.04, STATS., provides in relevant part:

> **Character evidence not admissible to prove conduct; exceptions; other crimes**
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> (1) CHARACTER EVIDENCE GENERALLY. Evidence of a person's character or a trait of the person's character is not admissible for the purpose of proving that the person acted in conformity therewith on a particular occasion, except:
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> (a) *Character of accused*. Evidence of a pertinent trait of the accused's character offered by an accused, or by the prosecution to rebut the same;
>
> (b) *Character of victim*. Except as provided in s. 972.11(2), evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;
>
> (c) *Character of witness*. Evidence of the character of a witness, as provided in ss. 906.07, 906.08 and 906.09.

support of a self-defense claim. However, a prerequisite to such conduct being admitted in the context of a self-defense claim is that the defendant both knew of the prior conduct and acted with that knowledge at the time of the confrontation. *See* ***State v. Daniels***, 160 Wis.2d 85, 94-97, 465 N.W.2d 633, 635-37 (1991). Similarly, to be admissible under § 904.05(2), STATS., there must be evidence of the defendant's knowledge of the victim's prior violent conduct which is the reason for the defendant's actions.[2] *See* ***State v. Boykins***, 119 Wis.2d 272, 277-78, 350 N.W.2d 710, 713 (Ct. App. 1984). Here, because there was no evidence that Grassl knew of Leick's prior conduct, the prior incident was not relevant and, therefore, properly excluded.

Finally, Grassl contends that the evidence was admissible under § 904.06, STATS., to establish a habit or routine on Leick's part when confronted with hostile situations.[3] He reasons that this would show Leick's motive or intent

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[2] Section 904.05(2), STATS., provides:

> **Methods of proving character**.
> ….
> (2) SPECIFIC INSTANCES OF CONDUCT. In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of the person's conduct.

[3] Section 904.06, STATS., provides:

> **Habit; routine practice.**
>
> (1) ADMISSIBILITY. Except as provided in s. 972.11(2), evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.
>
> (2) METHOD OF PROOF. Habit or routine practice may be proved by testimony in the form of an opinion or by specific instances of conduct sufficient in number to warrant a finding that the habit existed or that the practice was routine.

when confronted by Grassl with the pipe. Essentially, it would show that Leick intended to strike Grassl with his car and, thus, it would explain Grassl's reasons for striking the windshield of Leick's car in self-defense.

Evidence of a person's habit is relevant because it is more probable that a person acted consistently with that habit. ***French v. Sorano***, 74 Wis.2d 460, 466, 247 N.W.2d 182, 185 (1976). Relevant evidence means evidence having any tendency to make the existence of any fact that 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. Habit evidence must, however, be distinguished from "character" evidence, which is generally not admissible. The two are often confused.

> People sometimes speak of a habit for care, a habit for promptness, or a habit of forgetfulness. They may say that an individual has a bad habit of stealing or lying. Evidence of these "habits" would be identical to the kind of evidence that is the target of the general rule against character evidence. Character is a generalized description of a person's disposition, or of the disposition in respect to a general trait, such as honesty, temperance or peacefulness. Habit, in the present context, is more specific. It denotes one's regular response to a repeated situation.

1 MCCORMICK ON EVIDENCE § 195 at 825 (John W. Strong ed., 4th ed. 1992) (footnotes omitted).

How frequently and consistently instances of behavior must be multiplied in order to rise to the status of habit cannot be formulated and, as in other areas of relevancy, admissibility depends on the judge's evaluation of the particular facts of the case. ***Steinberg v. Arcilla***, 194 Wis.2d 759, 768, 535 N.W.2d 444, 447 (Ct. App. 1995). In Wisconsin, habit may be proved by specific instances of conduct sufficient in number to warrant a finding that the habit

existed. Section 904.06(2), STATS. This is an issue of conditional relevancy under § 901.04(2), STATS.[4] *See* ***French***, 74 Wis.2d at 466, 247 N.W.2d at 185-86 ("Any lack of evidence as to the conduct on a particular occasion is not a question of admissibility, but sufficiency.").

As applicable to § 904.06, STATS., the trial court determines whether a reasonable jury could find that the predicate evidence necessary to prove habit has been established. The predicate evidence must be sufficient to permit a reasonable jury to find a regular response to a repeated situation. *See* 1 MCCORMICK, *supra*. In response to Grassl's offer of proof, the trial court reasoned:

> [A]lthough there is not a minimum number of specific instances of conduct in order to establish a routine, practice or habit, I still think it has to be more than one. It's hard to say that this is routine where you have just one prior incident. You would end up trying that specific case almost in its entirety to show whether or not that case and the circumstances which gave rise to that particular response are consistent with that in the case at hand.
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> ….
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> … What it boils down to, I guess, is one act is insufficient to indicate habit or routine. It is insufficient to show a regular response to repeated specific situations.

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[4] Section 901.04(2), STATS., provides:

> (2) RELEVANCY CONDITIONED ON FACT. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the judge shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

The trial court's decision to reject the evidence as proof of habit or routine is reasonable. It is one incident occurring two years earlier under different circumstances. Although there may be some similarity, it is certainly not the type of evidence that would be relevant to prove that Leick had the habit of striking people with his car when confronted with a hostile situation.

Next, Grassl argues that by preventing him from introducing evidence of Leick's prior conduct, the trial court deprived him of his constitutional right to present a defense. This court disagrees. The due process rights of a criminal defendant are "in essence, the right to a fair opportunity to defend against the State's accusations." ***Chambers v. Mississippi***, 410 U.S. 284, 294 (1973). The right to present evidence is rooted in the confrontation and compulsory process clauses of the United States and Wisconsin Constitutions. ***State v. Pulizzano***, 155 Wis.2d 633, 645, 456 N.W.2d 325, 330 (1990). That right, however, is not absolute. ***Id***. at 646, 456 N.W.2d at 330 (citing ***Chambers***, 410 U.S. at 295). While the trial court may not "deny [a] defendant a fair trial or the right to present a defense by the mechanistic application of rules of evidence," ***State v. DeSantis***, 155 Wis.2d 774, 793, 456 N.W.2d 600, 609 (1990), "[c]onfrontation and compulsory process only grant defendants the constitutional right to present relevant evidence not substantially outweighed by its prejudicial effect." ***Pulizzano,*** 155 Wis.2d at 646, 456 N.W.2d at 330.

Although not articulated as such, the gravamen of Grassl's contention is that, in his case, the application of the evidentiary rules governing character evidence violated his right to present a defense. This court has previously observed in ***Milenkovic v. State***, 86 Wis.2d 272, 278, 272 N.W.2d 320, 323 (Ct. App. 1978) (quoting CALIFORNIA LAW REVISION COMMISSION, REPORT RECOMMENDATION & STUDIES 615 (1964)):

> Character evidence is of slight probative value and may be very prejudicial. It tends to distract the trier of fact from the main question of what actually happened on the particular occasion. It subtly permits the trier of the fact to reward the good … and to punish the bad … because of their respective characters despite what the evidence in the case shows actually happened.

The evidentiary rules governing character evidence are designed to prevent potentially prejudicial evidence of little probative value from reaching the jury. ***Evans,*** 187 Wis.2d at 84, 522 N.W.2d at 560. Here, the one specific instance of Leick's past conduct is prejudicial because it is the type of character evidence that is likely to distract the trier of fact from the main question of what actually happened when Grassl confronted Leick with the pipe. Accordingly, the trial court properly prevented this evidence of low probative value from reaching the jury. *See* ***Pulizzano,*** 155 Wis.2d at 646, 456 N.W.2d at 330.

Next, Grassl contends the trial court, when giving a supplemental jury instruction, improperly shifted the burden on him to show that he acted in self-defense. After the jury had been deliberating on the verdict, it presented the trial court with some questions. Grassl's complaint is with the trial court's response which was:

> So, if you feel it was done in self-defense, then it was not necessarily done with the intent to cause damage to the property. So then one of the five elements would not be present. You see all five elements, you have to find that all five elements were present before you can convict him of that.
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> And self-defense goes into that second element of the causing damage to property. That's how that ties in.
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> So, if you feel that self-defense was present, that means then that that second element is absent. If he is acting in self-defense, he is doing it with that intent and not the intent to cause damage to property.

Grassl argues that this instruction is confusing and misleading, and places the burden on him to demonstrate that he acted in self-defense, rather than maintaining the burden upon the State to demonstrate that he did not act in self-defense. This court is not persuaded. In its initial instructions, the trial court had instructed the jury that the burden rests with the State to prove the five elements of criminal damage to property beyond a reasonable doubt. The supplemental instruction continues to remind the jury that all five elements of criminal damage to property of another must be present before they could find Grassl guilty of the charge. The trial court merely explained the interaction of the second element of criminal damage to property (that Grassl intentionally caused damage to Leick's property) and self-defense. It does nothing more than that and certainly did not shift any burden of proof to Grassl.

Finally, Grassl contends that because his lawyer failed to object to the supplemental instruction which he claims was erroneous, he had ineffective assistance of trial counsel. Because the instruction was not erroneous, his claim of ineffective assistance of counsel also fails.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.