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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2014AP002187-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Cross-Appellant,

v.

KYLE LEE MONAHAN,

Defendant-Appellant-Cross-Respondent.

On Notice of Appeal from a Judgment and Notice of
Cross-Appeal from an Order Entered in the
Circuit Court for Lafayette County,
the Honorable William D. Johnston, Presiding

APPELLANT'S BRIEF AND APPENDIX

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ISSUE PRESENTED

Kyle Monahan and Rebecca Cushman were both ejected from Ms. Cushman's car when it crashed. The car had been going approximately 90 miles per hour. Ms. Cushman died, and Mr. Monahan was eventually charged with causing her death. At trial, witnesses testified that Ms. Cushman was driving at the beginning of the trip that led to the crash; the state argued that the two had switched places during a two-minute stop a few minutes before the crash occurred. Mr. Monahan sought to introduce GPS evidence showing that the vehicle had been traveling over 100 miles per hour before the posited driver switch. The state subsequently argued to the jury that Ms. Cushman, who was not from the area, would never drive so fast on unfamiliar roads. Did the court's exclusion of Mr. Monahan's contrary evidence deny him a fair trial?

The circuit court excluded Mr. Monahan's proffered evidence on the ground that it was "other acts" propensity evidence.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Briefing should suffice to present the case, so Mr. Monahan does not believe oral argument will be necessary. The issue for this court's resolution requires the application of settled law to a particular set of facts, so publication is not warranted.

STATEMENT OF THE CASE AND FACTS

At around 8:00 p.m. on August 20, 2011, a resident of Dunbarton Road in the Town of Shullsburg heard a car speeding up a hill on the road near his home. (152:7-8). He heard a "pop" and, going to investigate, saw the car upside down. (152:9-10). He also saw a woman, later identified as Rebecca Cushman, lying in a nearby creek. (152:10-11, 44). He called 911. (152:12). Emergency responders eventually located Kyle Monahan lying in a cornfield near the vehicle. (152:25, 33). Ms. Cushman died later that night. (2:10).

One year later, a complaint was filed charging Mr. Monahan with causing Ms. Cushman's death. (2). The case was tried to a jury. (151-56, 160). There was no dispute that Mr. Monahan and Ms. Cushman both had blood alcohol levels above the legal limit: approximately .14 for Mr. Monahan and .112 for Ms. Cushman. (153:173, 179). It was also clear that the vehicle had been traveling at very high speed in the seconds before the crash. (154:69-70).

The sole issue at trial was whether Mr. Monahan or Ms. Cushman, both of whom were ejected during the crash, was driving. The vehicle was hers; the two had taken it to a party at the Leahy residence north of Shullsburg. (2:8; 51:28; 160:47; App. 116). After leaving the party, they returned to Shullsburg in her car. (51:28; App. 116). GPS data showed that the car stopped for two minutes at Gratiot Street in Shullsburg before continuing to the location east of Shullsburg where the crash occurred. (51:28; App. 116). Two witnesses testified that Ms. Cushman was driving when she and Mr. Monahan left the Leahys'. (160:147-48, 157-58). The state argued to the jury that the two had switched positions during the two-minute stop in Shullsburg. (156:84-85). Mr. Monahan sought to introduce additional GPS data that

would have shown that the vehicle was traveling at similarly high rates of speed both before and after the two-minute stop, suggesting that Ms. Cushman remained the driver. (51:27-29, 61:2-4, 8-9; App. 115-17). The court refused to let him do so. (150:25-27; App. 112-114).

This appeal springs from the circuit court's exclusion of that evidence. This brief will summarize the evidence presented to the jury on the identity of the driver before discussing the GPS evidence in more detail.

Mr. Monahan's statements

An EMT testified that Mr. Monahan was unconscious when found and remained unresponsive for some time while being put on a back board, having a protective collar placed around his neck, and being moved up to the roadside. (160:33-35). On regaining consciousness, Mr. Monahan asked several times "what happened" and where Ms. Cushman was. (160:36). The EMT later heard Mr. Monahan say "I fell asleep" and "I'll never drink again" (160:37-38); another witness, a sheriff's deputy, testified that the statement was "that is the last time I will drink and drive," though he testified that the scene was noisy and he was six feet away. (152:72, 83).

The same sheriff's deputy testified that he asked Mr. Monahan if he was the driver and Mr. Monahan answered that he did not remember. (152:71). Mr. Monahan asked whether there had been a female in the vehicle. On being told that there was, he responded "I probably was driving, then." (152:71). Mr. Monahan told the deputy that he did not remember where they had been coming from. (152:71-72).

A firefighter testified that, while still lying in the cornfield, Mr. Monahan was asked whether he knew where he was and answered "no." (153:10-11). He also did not know how many people were in the car. (153:12). Asked who was driving, after being asked several times, Mr. Monahan responded "I was driving, I guess." (153:12).

The Shullsburg police chief testified that he spoke with Mr. Monahan after he was moved to the roadside. (152:37). Mr. Monahan stated that he had been was coming from Shullsburg, from Al Leahy's, and didn't know who the driver was. (152:27).

Another sheriff's deputy testified that he had also spoken with Mr. Monahan after he was moved to the roadside. Mr. Monahan was able to tell the deputy that Ms. Cushman was the female that had been located, but he did not know if anyone else had been in the vehicle, and could not recall who was driving. (152:44, 47).

A third sheriff's deputy, Michael Gorham, also testified about speaking with Mr. Monahan on the side of the road, after he had been removed from the field. Deputy Gorham stated that he had asked Mr. Monahan how many people were in the car, to which Mr. Monahan had responded "It depends who's asking." (152:91). Asked again, he responded that there had been two occupants, him and his girlfriend. (152:91). Deputy Gorham testified that he asked Mr. Monahan who was the driver, to which Mr. Monahan responded "I might have been, I guess." (152:91).

Deputy Gorham testified that he was directed by another deputy sheriff to get a more definitive statement from Mr. Monahan, so he reapproached him, this time with an audio recorder running. (152:92). Gorham testified that he told Mr. Monahan that "We need to be clear about

something" asked how many people were in the car, to which Mr. Monahan responded "two." (152:92). Asked "Were you the driver?" Mr. Monahan replied "Yeah, I guess." (152:92). Deputy Gorham relayed that during that conversation, he told Mr. Monahan that one of the firefighters had seen him driving the car out of Shullsburg. (152:92).

In fact, the audio of the conversation was introduced at trial. It records the exchange as follows:

> Gorham: Kyle, we need to be clear about some stuff. There was only two of you in the car?
>
> Monahan: Yeah.
>
> ….
>
> Gorham: OK. One of the firemen said that they saw you driving the car out of Shullsburg – so you were the driver?
>
> Monahan: Yeah.
>
> Gorham: You were?
>
> Monahan: Yeah.
>
> Gorham: OK. You're not BSing or anything right?
>
> Monahan: I don't think so.
>
> Gorham: You don't think so?
>
> Monahan: [Groans]
>
> [Here the interview briefly pauses, as medical personnel are attempting to insert an IV and Mr. Monahan expresses that he is in pain]
>
> Gorham: Is there anything else that, can you explain what happened?

> Monahan: No.
>
> Gorham: You don't remember how the crash occurred?
>
> Monahan: I just remember fuckin' my tires go off the ditch [or edge] and I could not correct it. [Groans]
>
> Gorham: You remember the tires going off the … what was that?
>
> Monahan: Can we talk tomorrow?
>
> Gorham: Alright, I'll let the EMT's continue to treat you, OK?

(92:Exh. 12).

Gorham testified that he later interviewed firefighters and none had in fact seen Kyle driving the car out of Shullsburg. Gorham maintained, however, that a firefighter who he didn't know had told him this at the accident scene. (152:97-98). This firefighter was never found. (152:99).

Mr. Monahan was taken from the crash scene in a helicopter. (154:7, 9). At trial a flight nurse read from her report that "Patient states that he remembers the accident and appears to have full recall of the incident. Patient states that he was the driver of the vehicle and was wearing his seat belt," (154:27-28), though in fact neither Mr. Monahan nor Ms. Cushman were wearing their seatbelts. (154:62).

At 12:30 in the morning, Mr. Monahan was taken off sedation briefly in the hospital. (160:9). At trial a nurse read from her notes that after he woke up, he wrote that he remembered the accident, and that he was going too fast over a hill and lost control of the vehicle. (160:9).

Ten days after the crash, Mr. Monahan was interviewed by a state trooper. (153:45). Mr. Monahan told the trooper he had "no idea" who had been driving at the time of the crash. (153:48). At a subsequent interview, he told the trooper that Ms. Cushman was an aggressive, "kind of nuts" driver. (153:56).

Crash reconstructions/physical evidence

The state called as an expert a state trooper, certified in crash reconstruction, who had conducted a crash reconstruction analysis. (154:51). Based on damage to the vehicle, skid marks, furrowing and debris on the ground, the shape of the terrain, and the GPS data, the trooper hypothesized a path for the vehicle from the beginning to the end of the crash. (154:58-65). The trooper opined that the vehicle had been moving between 87 and 98 miles per hour when it began to skid. (154:67, 72). It skidded off the left shoulder and into the ditch, and began to yaw to the left so that the passenger side was leading. (154:66-67). It traveled across the ground sideways for some distance before it "tripped" and it began to tumble sideways. (154:108-09). At some point the tumbling became more end-over-end before the vehicle finally came to rest. (154:114).

The trooper also testified that the GPS data showed that the vehicle was traveling an average of 60, 76 and 96 miles per hour on three "segments" of the trip leading up to the crash. (154:69-70).

Based upon his conclusions about the car's movement through the crash, the trooper testified that the occupants would have been moving toward either the front or the passenger side during the sequence. (154:108-20). He opined that the passenger would have been ejected first through the open passenger window, and that because Ms. Cushman was

found closer to the beginning of the crash, she must have been the passenger. (154:130-31, 134). He posited that the driver could not have been ejected first because the passenger would have "blocked" the path through the window. (154:136).

Mr. Monahan presented expert testimony from an engineer who also analyzed the crash. He opined that either the driver or the passenger could have been ejected first, and particularly noted that the open sunroof provided another port through which the driver could have been ejected during the rollover while the passenger remained in the vehicle. (160:90-95).

The trooper also discussed the condition of the clothing Mr. Monahan and Ms. Cushman had been wearing. (154:121). Ms. Cushman's shirt and pants had a great deal of dirt on them, whereas Mr. Monahan's clothing had less. (154:122, 129). From this, the trooper concluded that Ms. Cushman was sitting in the passenger seat during the earlier portion of the crash sequence, when the vehicle was "furrowing" and kicking up dirt. (154:126). Mr. Monahan's expert noted that the dirt was on both Ms. Cushman's inner and outer clothing and on the back of her pants, and that there were dirt and grass stains on both the outside and inside of her shirt. From this he concluded that the dirt could not have come from a "spray" through the passenger window, but more likely got on her clothing after her ejection from the vehicle as she tumbled. (160:96-99).

The trooper also noted the position of the front seats of the vehicle; specifically, that the driver's seat was further back than the passenger's. (154:129; 153:92). Ms. Cushman was between five feet five inches and five feet eight inches tall; Mr. Monahan is between six feet and six feet one inch

tall. (154:130; 152:143). Ms. Cushman's mother testified that Ms. Cushman always sat with her seat as close to the steering wheel as possible. (155:115). Mr. Monahan's expert explained that he had located a vehicle of the same year, make and model as Ms. Cushman's, and had adjusted the steering wheel and seats to match their locations in the crashed vehicle. (160:82-88). He located a male and female of approximately the same stature as Mr. Monahan and Ms. Cushman. (160:88). The female sat in the driver's seat of the vehicle and the male in the passenger's seat; and photographs were taken. (160:88-89). The expert testified that both were able to sit comfortably in the seats, and that the female was easily able to use the brake and accelerator pedals and steering wheel. (160:89-91).

The trooper showed photographs of the brake and accelerator pedals and opined—though he had no specialized training in the matter—that there was a pattern of dirt on the pedal that looked more like the sole of Mr. Monahan's footwear than that of Ms. Cushman's. (154:78-83). The forensic analyst from the state crime lab testified that on examining the pedals, she did not see any impression that she could conclusively say was a footwear impression. (160:44-45).

A DNA analysis was performed on certain portions of the car. The analyst, from the state crime lab, testified that the DNA of two different people was found on the driver's side airbag. (153:154). Kyle Monahan was the source of the major component of this DNA, but the source of the minor component could not be identified. (153:154-55). The state's expert witness opined that Ms. Cushman would have been thrown from the vehicle before the airbag deployed, while Mr. Monahan's testified that the "furrowing" closer to the beginning of the crash would have been sufficient to deploy

the airbag. (155:85, 89-90; 160:121-22). Mr. Monahan's expert testified that given that there were two people in the car, it was likely that Ms. Cushman was the source of the minor DNA component. (160:80).

In the end, the state's expert opined that Mr. Monahan had been driving the car, while Mr. Monahan's testified that it was not possible to determine whether he or Ms. Cushman had been driving. (154:136; 160:90).

Witnesses from the Leahy party

Linda Scott, a guest at the Leahy party, testified that she had seen Mr. Monahan and Ms. Cushman depart the gathering. (160:147). She testified that Ms. Cushman was driving, and she recalled Mr. Monahan giving her a "kind of goo-goo smile" from the passenger seat, which stuck in her mind because she thought it was sweet. (160:147-48).

Jason Scott, another guest, also testified that he saw Ms. Cushman and Mr. Monahan leaving the party. (160:157). He recalled saying goodbye to them as they walked toward her car, and then seeing Ms. Cushman get in on the driver's side, and Mr. Monahan on the passenger side. (160:157-58).

Mr. Monahan also testified. He told the jury that Ms. Cushman never let anyone drive her car, and that she told him (and others) that her grandparents gave it to her and she didn't want anyone driving it. (155:35). Mr. Monahan also recalled that she was driving when the two left the Leahy farm. (155:41).

The excluded evidence

Using the same GPS data relied on by the state's expert, Mr. Monahan's expert determined the vehicle's speeds both on the trip to the Leahy farm and the trip from the

farm to Shullsburg immediately before the crash. This data showed that the vehicle traveled at high speeds for both of these trips. (51:27-28; 69:1-2; 155:35; 160:147-48, 157-58; App. 115-16). Specifically, the GPS recorded data showing speeds of 79-82, 86, and 93 miles per hour on different stretches of the trip to the Leahy farm which began at 4:32 and ended at 4:40 p.m. (the posted speed limit was 55 miles per hour). (51:27-28; 69:1; App. 115-16). On the trip away from the Leahy farm and into Shullsburg, between 7:39 and 7:49 p.m., the GPS revealed speeds of 82 to 85, 86, and 102 to 105 miles per hour. (51:28; 69:2; App. 116). After a two-minute stop at Gratiot street in Shullsburg, the vehicle headed out of town, reaching 97 and 117 to 120 miles per hour leading up to the crash at 7:54 p.m. (51:28-29, 69:2; App. 116-17).

Mr. Monahan sought to introduce this evidence to show that the same driver, Ms. Cushman, was driving during each of these periods. (61:2-4, 8-9). The circuit court excluded it at a pretrial hearing, concluding that it was inadmissible other-acts evidence under ***State v. Sullivan***, 216 Wis. 2d 768, 576 N.W.2d 30 (1998). (149:38-39, 45; App. 104-05, 111). Mr. Monahan moved the court to reconsider, submitting that the GPS information falls under the exception for evidence offered to show identity. (70:2; 150:23). He also argued that the driving in the minutes leading up to the accident were part of the same act; "a continuum of the conduct [which] lasted more than the final 3 minutes and 27 seconds. To exclude it until the final journey will deprive the jury of important context it needs to make its decision." (70:3; 150:23). Mr. Monahan finally argued that excluding the evidence would deny his constitutional right to present relevant evidence in his defense. (70:3; 150:21). The court denied the motion. It held that the "continuum" of conduct commenced only after the

vehicle's stop at Gratiot Street a few minutes before the crash; and that all evidence of speed before that time would be excluded. (150:25-27; 80; App. 112-14).

The closing argument

During closing, the state argued that Mr. Monahan and Ms. Cushman must have switched positions after leaving the Leahy party during the two-minute stop in Shullsburg, saying "[t]he evidence if there was a switch would come and all the evidence we've gathered post-crash is that, in fact, it was the defendant behind the wheel. The evidence of the seat position, DNA. How could there not have been a switch? There is definitely evidence of it." (156:84-85).

The state also twice argued to the jury that, being unfamiliar with the roads in the area, Ms. Cushman would never have driven them as fast as the vehicle was traveling before the crash:

> So using your common sense, you need to ask yourself, does it make sense that a young girl who doesn't know the area is driving on some rural road and driving, no less, after she'd been drinking at speeds of 40 to 50 miles per hour over the speed limit? That doesn't make sense. So we've got that. Using your common sense, that tells you it's the defendant behind the wheel.

(156:32).

> If it's Rebecca who was driving that night, again we'd have to believe she's driving on that rural country road in a place she's not familiar with on a road she's not familiar with. Despite the fact that she's not familiar with that road, we have to believe that she's traveling—after having some drinks, traveling 40 to 50 miles per hour over the speed limit on a road she has no experience or familiarity with.

(156:44-45).

The jury convicted Mr. Monahan of three counts related to Ms. Cushman's death. (110). The court subsequently dismissed two of these counts on the parties' agreement as barred by statute and multiplicitous. (157:3-7). On the remaining count the court sentenced Mr. Monahan to 20 years of imprisonment, with 10 years of initial confinement and 10 years of extended supervision. (132). Mr. Monahan filed a postconviction motion to eliminate the DNA surcharge, which was granted and is the subject of the state's cross-appeal in this case. (161; 178). Mr. Monahan filed a notice of appeal from his judgment of conviction. (171).

ARGUMENT

The Circuit Court Erred in Excluding Evidence that Ms. Cushman Drove her Vehicle at High Speeds in the Hours and Minutes Before the Crash.

A. Summary of Argument and Standard of Review.

The crash of Ms. Cushman's car ejected both occupants. GPS data revealed that the car had been traveling 40 or 50 miles per hour over the speed limit when the crash occurred. The sole issue at the seven-day trial was whether the defendant, Mr. Monahan, had been the driver, or whether Ms. Cushman had. Two witnesses testified that Ms. Cushman was driving the car when it left the Leahy farm on the trip that ended with the crash. Mr. Monahan testified to this as well, and also that Ms. Cushman was driving the car on earlier trips that day. The state's theory was that Ms. Cushman and

Mr. Monahan switched drivers during a two-minute stop in Shullsburg also revealed by the GPS data. (156:84).

The circuit court prevented the jury from hearing additional GPS evidence that would have shown that, both on the way to the Leahy farm and on the way from the farm to the purported driver switch, the vehicle traveled at speeds ranging from 79 to 105 miles per hour. The court excluded this information on the theory that it was "other acts" evidence and thus inadmissible under Wis. Stat. § 904.04(2).

This exclusion was in error. First, and particularly as to the speeds reached after leaving the Leahy farm, the reckless driving was not an "other" act at all; it was rather a part of the course of conduct that led up to and caused the accident. Second, even if the driving were an "other act," it was nevertheless admissible to show both identity and context. Finally, even if Wisconsin evidentiary law *did* call for the exclusion of this evidence, Mr. Monahan nevertheless had a constitutional right to present it. Evidence that Ms. Cushman had been driving recklessly *moments* before the reckless-driving crash is so probative, and so important to Mr. Monahan's case, that excluding it denied him his right to present a defense.

This court generally reviews a circuit court's decision to exclude evidence for erroneous exercise of discretion. ***State v. Jackson***, 188 Wis. 2d 187, 194, 525 N.W.2d 739 (Ct. App. 1994). However, whether the exclusion of particular evidence has denied a defendant's constitutional right to present a defense is a question of law for this court's de novo review. ***State v. Dodson***, 219 Wis. 2d 65, 69, 580 N.W.2d 181 (1998).

B. The evidence of Ms. Cushman's driving immediately before the crash was not "other acts" evidence.

Wisconsin Stat. § 904.04(2) generally forbids the evidence of "other … acts … to prove the character of a person in order to show that the person acted in conformity therewith." However,

> What is meant by "other" in Wis. Stat. § 904.04(2) continues to plague the case law. Put differently, when must the trial court apply the ***Sullivan*** analysis rather than an ordinary relevancy analysis? "Other act" connotes occurrences that are separated in time, place, or manner from the event alleged in the pleadings. In criminal cases multiple offenses may occur during the same event. For example, a "gang-rape" committed over a three-hour period will most likely embrace numerous charged and uncharged offenses. All acts occurring during the three-hour period should be scrutinized for relevancy under Wis. Stat. § 904.01 and probative value under Wis. Stat. § 904.03; there is no need to resort to the three-step ***Sullivan*** analysis because the acts are so closely linked in time, place, and manner.

Daniel D. Blinka, Wisconsin Evidence § 404.6 at 175 (3rd ed. 2008).

Evidence that Ms. Cushman was driving her car at 80, 90, and 100 miles per hour a few minutes before that car left the road at 90 miles per hour is not "character" evidence. It is relevant not because it shows that Ms. Cushman was, in general, predisposed to high-speed driving, but because it shows that she was driving at high speeds in the moments before her car crashed at high speed.

The knowledge that a person is engaging in a particular activity at a given moment gives rise to a

reasonable inference that the person was engaging in that same activity a few minutes later, independent of any judgment about the "character" of that person. If you see a neighbor out bicycling and then hear, a few moments later, that a cyclist has been struck by a car, you are concerned for your neighbor not because he has a "character" for cycling but because you know he had been cycling and reasonably believe that he may have continued. This inference is of course not infallible—the neighbor may have ended his ride—but infallibility is not the evidentiary standard. Evidence is relevant where it has "*any* tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable." Wis. Stat. § 904.01 (emphasis added).

The law recognizes this commonsense observation. A particular act is not "other," and falls outside the rule of Wis. Stat. § 904.04(2), "where multiple crimes are committed during a single 'transaction' or where the bad act occurs at the same time as the offense. Inextricably … intertwined events should be analyzed for relevancy and unfair prejudice." Blinka, § 404.07 at 199. Here, the driving within a few minutes of the crash was part of an "integrated event" and thus not subject to § 904.04(2). ***Hammen v. State***, 87 Wis. 2d 791, 799, 275 N.W.2d 709 (1979) (defendant's offer to sell hashish not severable from threat to shoot companion shortly thereafter).

The same concept is also sometimes expressed by naming "context" as an exception to the Wis. Stat. § 904.04(2) rule of exclusion. In ***State v. Chambers***, the court held admissible evidence of uncharged sexual assaults involving the defendant, his accomplice, and the same victim occurring within the three hours of the charged assaults. 173 Wis. 2d 237, 256, 496 N.W.2d 191 (Ct. App. 1992).

Noting that "an accepted basis for the admissibility of evidence of other crimes arises when such evidence furnishes part of the context of the crime or is necessary to a full presentation of the case," the court held that "limiting the evidence to only the first six sexual contacts would leave the jury with an incomplete understanding of the incident." ***Id.*** at 255-56 (citation omitted). The essence of the "context" exception is to admit evidence that "is not only helpful in understanding what happened, but … necessary to complete the story by filling in otherwise misleading or confusing gaps." Blinka, § 404.07 at 199.

In this case, preventing the jury from hearing evidence that Ms. Cushman was driving at high speeds moments before the crash left them "with an incomplete understanding" of the circumstances surrounding the accident. Moreover, the state exploited this incomplete understanding to create a false impression for the jury, twice suggesting during closing that it was "common sense" that Ms. Cushman, being unfamiliar with the local roads, would never drive at so high a speed as that which caused the crash, and so could not have been the driver. (156:32, 44).

What the state knew, and the jury did not, was that there is reason to believe that Ms. Cushman did exactly what "common sense" says she would not have, and that she was in fact doing it just moments before the fatal crash occurred. The exclusion of Ms. Cushman's driving thus permitted the state effectively to alter the facts of the case. *See* ***State v. Bergeron***, 162 Wis. 2d 521, 531, 470 N.W.2d 322 (Ct. App. 1991) (evidence of other acts admissible where excluding them would require "altering the facts of the case"); *see also See* ***Com. v. Carroll***, 789 N.E.2d 1062, 1068-69 (2003) (prosecutor "improperly exploited the absence of evidence that had been excluded at his request").

C. Even if it was "other acts" evidence, Ms. Cushman's high-speed driving preceding the crash was admissible to show identity.

Even assuming that Ms. Cushman's driving should be analyzed as "other acts" under Wis. Stat. § 904.04(2), it was still admissible as it was offered to prove her identity as the driver in the crash. § 904.04(2)(a) (stating that the subsection "does not exclude .. evidence when offered for other purposes, such as … identity").

Where the state offers other-act evidence to show the identity of a defendant, it must show "such a concurrence of common features and so many points of similarity between the other acts and the crime charged that it can reasonably be said that the other acts and the present act constitute the imprint of the defendant." ***State v. Scheidell***, 227 Wis. 2d 285, 304, 595 N.W.2d 661 (1999) (citation omitted). However, where a *defendant* offers such evidence to show that another party committed the crime, the standard is relaxed: instead of showing the "'imprint' or 'signature'" of that other party, the defendant need only show "similarities between the other act evidence and the charged crime." ***Id.*** at 304-05; *see also* ***State v. Johnson***, 184 Wis. 2d 324, 353, 516 N.W.2d 463 (Ct. App. 1994) (Anderson, J., concurring) (noting that risk of prejudice underlying other-acts rule is absent where not offered against criminal defendant).

Such "similarity" between the charged crime and the other act is measured by "nearness of time, place, and circumstance of the other act to the crime alleged." ***Scheidell***, 227 Wis. 2d at 305. The probative value of the proffered evidence becomes a factor in the overarching other-acts framework set out in ***Sullivan***. ***Scheidell***, 227 Wis. 2d at 306.

That framework asks three questions: whether the evidence is offered for a permissible purpose, whether it is relevant and probative, and whether its probative value is substantially outweighed by the risk of "unfair prejudice, confusion of the issues or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence[.]" ***Sullivan***, 216 Wis. 2d at 772-73.

The GPS evidence excluded by the court amply satisfies the ***Sullivan*** test. First, it was offered for an acceptable purpose – to show the similarity between the driving when witnesses testified Ms. Cushman was operating the vehicle and the driving that preceded the crash, and thus to indicate that Ms. Cushman was the driver when the crash occurred: that is, to show the identity of the driver.

Second, the GPS evidence was highly relevant and probative to this purpose. As noted above, unlike the state, a defendant need not demonstrate so strong and unusual a resemblance between the offered evidence and the charged crime as to amount to a "signature" or modus operandi; he or she must only show "similarity" with respect to time, place and circumstance. ***Scheidell***, 227 Wis. 2d at 304-05. As to time and place, the driving behaviors Mr. Monahan sought to introduce occurred from about three and a half hours to five minutes before the crash and within a few miles of the crash site. (51:27-29, 69:1-2; App. 115-17). As to "circumstance," the circumstances of the driving were virtually identical – in the same vehicle, along county highways and rural roads, at drastically excessive speeds.

Moreover, in assessing the probative value of the GPS evidence, it is important to recognize the differences separating this case from the typical other-acts "identity" case. Identity cases usually involve an attempt to show that a

person (often the defendant) has committed acts very similar to the charged crime: so similar that it would be surprising—would "defy the odds"—to find that some other person had happened to commit such a distinctive act. *See* ***Scheidell***, 227 Wis. 2d at 308. This is why the "similarity" bar is typically set quite high, at least for the state. The other acts must be so similar as to, in effect, distinguish the defendant from the entire universe of other potential suspects.

Here, by contrast, the universe of potential drivers at the time of the crash is quite small, consisting of two people. The jury's task was to identify the operator of the vehicle not from the entire world of drivers, but from the two people in the car. If this were a charge of a hit-and-run involving speeding by an unknown vehicle, evidence of prior speeding by the defendant would be of low probative value because there are many, many other speeders in the world who could have committed the crime. But here, Ms. Cushman was one of two people who may have been driving over 100 miles per hour seconds before the crash. Evidence tending to show that she was driving over 100 miles per hour on the same journey *minutes* before the crash is probative evidence that she was also doing so minutes later.

The evidence was also probative in a different way. As the state recognized in its closing, there is a natural, commonsense assumption that a person like Ms. Cushman, who was a visitor in the area in which the crash occurred, would not drive an unfamiliar road at the speed at which the crash occurred. This assumption, which the state sought to deploy against Mr. Monahan, would have been countered by the evidence of Ms. Cushman's earlier driving.

Finally, turning to the third prong of the ***Sullivan*** test, the probative value of the evidence was not substantially

outweighed by any other consideration. The "unfair prejudice" typically associated with other-act evidence in criminal cases is that the jury will view the other bad acts as reason to "punish the accused for being a bad person regardless of his or her guilt of the crime charged." ***Sullivan***, 216 Wis. 2d at 783. Whether or not fast driving would truly arouse a jury's instinct to "punish" a defendant, in this case, the offered evidence involved speeding by a person who was not on trial, and who was in fact deceased and so could not be "punished." There was little danger that the information Mr. Monahan sought to introduce would sway the jury from performing its duty to determine whether he caused Ms. Cushman's death.

Nor were any of the other Wis. Stat. § 904.03 factors implicated. There was no risk of confusing or misleading the jury as to the issues. The sole issue in this case was who was driving when the crash occurred, and the proffered evidence bears directly on this question. The GPS evidence was simple and discrete and could have been presented in a few minutes, and it was not cumulative to any other evidence.

Because the proffered evidence was highly relevant and probative as to the identity of the driver—a Wis. Stat. § 904.04(2) exception and the sole issue in the trial—the circuit court erroneously exercised its discretion in excluding it.

D. Even if the circuit court properly applied Wisconsin evidentiary law, its exclusion of the GPS data violated Mr. Monahan's constitutional right to present a defense.

The federal and state constitutions each guarantee a criminal defendant "a meaningful opportunity to present a complete defense." ***California v. Trombetta***, 467 U.S. 479,

485 (1984); ***State v. St. George***, 2002 WI 50, ¶14 & n.8, 252 Wis. 2d 499, 643 N.W.2d 777 (explaining that the right is rooted in the Sixth and Fourteenth Amendments of the federal Constitution and art. I, § 7 of the state Constitution).

In ***Chambers v. Mississippi***, 410 U.S. 284 (1973), the United States Supreme Court held that state evidentiary rules, while generally valid, must give way where they would thwart this right. In that case, Chambers, who was accused of killing a policeman during a melee at a bar, introduced another man, McDonald's, statement that he had fired the fatal shots. ***Id.*** at 285-86. McDonald repudiated his confession on the stand. ***Id.*** at 291. Chambers moved to be allowed to impeach the recantation by cross-examination and by calling other witnesses who would have testified that McDonald had confessed to them, but the court denied these requests as contrary to Mississippi's hearsay and other evidentiary rules. ***Id.*** at 291-93, 299. The jury convicted Chambers. ***Id.*** at 285.

The Court concluded that although the rule against hearsay had "long been recognized and respected by virtually every State," ***Id.*** at 298, "where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice," *id.* at 302.

The Court has since clarified that this principle extends beyond hearsay to other evidentiary rules:

> State and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials. This latitude, however, has limits…. [T]he Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense. This right is abridged by evidence

> rules that infringe upon a weighty interest of the accused and are arbitrary or disproportionate to the purposes they are designed to serve.

Holmes v. South Carolina, 547 U.S. 319, 324 (2006) (citations omitted).

Denying Mr. Monahan his opportunity to present his evidence "infringed upon a weighty interest" in a manner both "arbitrary" and "disproportionate to the purposes" of the other-acts rule. The identity of the driver during the crash was the only real issue in this seven-day jury trial. Mr. Monahan's witnesses placed him in the passenger seat, and Ms. Cushman in the driver's seat, 15 minutes before the crash, but the state posited that they had exchanged places during the trip. The connection between Ms. Cushman's driving and the driving that caused the crash was Mr. Monahan's only means of countering the state's argument—clearly a "weighty interest." He was denied the chance to present this connection to the jury, and the jury, it seems, accepted the state's unchallenged version of the facts.

This abridgement of Mr. Monahan's interest was achieved by an application of the other-acts rule that excluded *only* that speed evidence that would have been helpful to him. The court ruled that all GPS evidence of the vehicle's speed *after* the state's theorized driver switch would be admissible. (150:25-27; App. 112-14). There was no logical basis for this ruling other than a conclusory statement that the vehicle's pause at that time was the beginning of the "continuum" leading to the crash. (150:26-27; App. 113-14). Cutting off the speed evidence at the point where it becomes useful to the defendant is the very definition of an "arbitrary" application of the other-acts rule. *See* ***Holmes***, 547 U.S. at 324.

The exclusion of the GPS evidence was also "disproportionate to the purposes" of Wis. Stat. § 904.04(2). As discussed above, the rule is intended to avoid tempting the jury to "punish the accused for being a bad person regardless of his or her guilt of the crime charged." ***Sullivan***, 216 Wis. 2d at 783. For the obvious reasons already given, this was not a possibility in Mr. Monahan's case; nor is there a realistic likelihood that the jury would elect to "punish" the deceased Ms. Cushman for her prior "crime" of speeding by acquitting Mr. Monahan if convinced of his guilt. The only effect of admitting the proffered GPS evidence would have been to allow the jury to hear the full story of the events leading to Ms. Cushman's death. The effect of excluding it was to prevent this, and to deny Mr. Monahan his right to present a defense.

CONCLUSION

For the foregoing reasons, Mr. Monahan respectfully requests that this court reverse his conviction and sentence and remand the case to the circuit court for a new trial.

Dated this 16th day of February, 2015.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 6,387 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 16th day of February, 2015.

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CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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