STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I
APPEAL NO. 2005PA001486-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

WALTER MISSOURI,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION AND ORDER DENYING POSTCONVICTION MOTION FOR A RETRIAL ENTERED IN THE MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE MEL FLANAGAN, PRESIDING

DEFENDANT-APPELLANT'S BRIEF AND APPENDIX

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The issues presented by this appeal are of state-wide importance because they involve the use of "other acts evidence" in the form of alleged police misconduct against the State to rebut the suggestion that police officers are unlikely to fabricate evidence against defendants. Therefore, both oral argument and publication are recommended.

STATEMENT OF THE ISSUES

I. Whether the trial court abused its discretion in denying the appellant's pretrial motion to admit the testimony of an "other acts" witness to the effect that the arresting officer in this case had behaved in an abusive way toward him (the other acts witness).

ANSWERED BY THE TRIAL COURT: No

II. Whether the trial court abused its discretion in denying the appellant's postconviction motion for a new trial on the basis of newly-discovered evidence where the newly-discovered evidence was the testimony of four additional other acts witness who were prepared to testify that the arresting officer had planted drugs on them and had physically abused them.

ANSWERED BY THE TRIAL COURT: No

SUMMARY OF THE ARGUMENT

I. THE TRIAL COURT ABUSED ITS DISCRETION IN EXCLUSING OTHER ACTS EVIDENCE AT TRIAL.

The State presented evidence at trial that the police were chasing a drug suspect who had fled in a white car. Nearby the officers, including Officer Jason Mucha, encountered Missouri who was seated in the passenger seat of a white car. When officers approached Missouri they claim he made furtive movements toward his mouth and attempted to lock the doors of the car. Mucha claimed that he was required to forcibly remove Missouri from the

car and, when he resisted, Mucha delivered "knee strikes" to him. Police claim they found cocaine in Missouri's mouth.

Missouri , on the other hand, testified that he was minding his own business when the police approached him, violently removed him from the car, physically abused him, and planted cocaine on him.

In a pretrial motion Missouri sought to introduce the testimony of Booker Scull who was prepared to testify he had a prior encounter with Mucha and that Mucha had abused him in a similar manner.

The trial court excluded Scull's testimony. In doing so, though, the trial court abused its discretion because the court's reasoning did not touch upon the proper factors; rather, the court made a predetermination that Scull and Missouri were untruthful and excluded the testimony because citizens should not be encouraged to make up claims of police abuse.

II. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING MISSOURI'S MOTION FOR A NEW TRIAL BASED UPON NEWLY-DISCOVERED EVIDENCE.

Following his conviction Missouri discovered the existence of several other witnesses who were prepared to testify that they had similar encounters with Officer Mucha. Missouri then filed a postconviction motion for a new trial on the basis of newly-discovered evidence.

The trial court denied Missouri's motion for a new trial. Significantly, the court did find that that evidence was not newly-discovered nor that it would not have changed the jury's verdict if the jury had heard it; rather, the court reasoned that the testimony of the other acts witnesses would not have been admitted because it was nothing but "naked allegations". The court concluded that to complete the context of each situation involving the other acts witnesses would have required a "mini-trial" and, therefore, the other acts testimony would have been excluded under Sec. 904.03, STATS.

The trial court abused its discretion in denying Missouri's motion for a new trial. Firstly, the proposed other acts evidence is admissible and would survive the ***Sullivan*** analysis. It was offered for a permissible purpose under the statute to show Mucha's routine practice. The testimony of each witness would have been based upon personal knowledge. Simply because the State might have chosen to complete the context of each incident (i.e. to have a "mini-trial") does not render the testimony inadmissible. Sec. 904.03 prohibits the *needless* presentation of evidence; it prohibits evidence which might *confuse* the jury; and it allows the court to exclude evidence which might result in a *waste of time.* Here, the context of the situation is not needless. The evidence is necessary to avoid confusing the jury- and getting to the truth of the matter, however long it takes, cannot be considered a waste of time.

Thus, the trial court abused its discretion in denying Missouri's motion for a new trial.

STATEMENT OF THE CASE

I. PROCEDURAL BACKGROUND

The defendant-appellant, Walter Missouri ("Missouri"), was charged with possession of cocaine with intent to deliver and resisting an officer arising out of an incident that occurred in Milwaukee on January 7, 2004. The complaint alleged that Milwaukee Police were investigating a complaint of drug dealing and began pursuing a suspect. That suspect eluded the officers; however, they then came upon Missouri who was seated in the passenger seat of a parked car. According to the complaint, police attempted to interview Missouri but Missouri resisted by attempting to lock the car door. Police opened the door and grabbed Missouri who, according to the police, continued to physically resist. Missouri was physically removed and dragged to the rear of the car. There, police claim that they found a bindle of cocaine on Missouri. (R:2).

Significantly, the primary officer involved in the struggle with Missouri was Milwaukee Police Officer Jason Mucha.

Missouri entered pleas of not guilty to both counts. Missouri filed a number of pretrial motions; however, at issue here is Missouri's motion for a preliminary ruling on the admissibility of the testimony of an "other acts" witness, Booker Scull. (R:6)[1] Missouri alleged in the motion that police planted the cocaine on him and physically abused him in the process. Scull's affidavit was attached to the motion. It alleged that on June 27, 2003 Scull heard gunshots and went outside to see if he could locate his son. Scull's son then went into the house. Officer Mucha then approached Scull and asked him why his son ran into the house. Scull asked Mucha what business he (Mucha) had at my (Scull's) house. Mucha told Scull that he could "come over here any time I want, nigger." The incident then became violent with Mucha coming onto the porch and striking Scull in the head with a hard object causing a laceration. Scull also broke two teeth in the struggle.

The trial court ruled that Scull's testimony was not admissible. Specifically, the court reasoned, "If I were to permit the defense to go in this way, then all of that would—all that that would do is inspire people to make claims of beatings by the police. That is inflammatory, and without anything really to back this up othat than this allegation . . ." (R:29-8)

The case was then tried to a jury. The jury returned verdicts finding Missouri guilty of both counts. The court sentenced Missouri to four years initial confinement and five years extended supervision on the drug charge and nine months in jail, concurrent, on the resisting charge.

Missouri timely filed notice of intent to pursue postconviction relief. He then filed a motion for a new trial on the grounds of newly discovered evidence. Following the trial Missouri discovered a number of additional "other acts" witnesses who were prepared to testify that Officer Mucha (or other officers involved in the Missouri case) planted cocaine on them and physically abused them. (R:20).

The motion summarized the newly discovered evidence as

1 The remaining facts in this paragraph constitute a summary of the facts alleged in Scull's affidavit

follows[2]:

> A. **Ricky Green**. Green was riding in a car with his cousin, Bernard Shaw. They were stopped at a bus stop talking to a woman there when Officer Mucha, Officer Westergard, and Officer Awadallah, surrounded the car with their guns drawn. Then men were originally arrested for "blunts" in the ashtray of the car. While being placed into the paddy wagon one of the officer struck Green in the stomach hard enough to make Green double-over and fall- hitting and injuring his cheek in the process. Once at the police station the officers claimed that the Green "threw down" some cocaine. Green denies this.
>
> B. **Sylvester Hamilton**. On July 12, 2004 Hamilton was arrested by Officers Mucha and Dineen for allegedly interfering with a felony arrest of a third party Hamilton was severely beaten. The matter was investigated by Internal Affairs and, according to the report of Cindy Papka, the matter was turned over to Asst. District Attorney Thomas McAdams. The disposition of that matter is not known; however, Hamilton is pursuing a civil lawsuit.
>
> C. **James Murry**. Murry is charged with possession of cocaine with intent to deliver (Case No. 04-CF-000658). The matter is currently set for jury trial on May 23, 2005 before Hon. Charles Kahn. The discovery materials in the Murry case reflect that Officer Jason Mucha and "PO McNair" responded to a trespassing complaint at the home of David Bingham. Officer Mucha claims that he was admitted to Bingham's apartment and they discovered Murry seated at a table cutting cocaine.
>
> Murry's theory of defense in that case is that Bingham, who is a long-time friend, called Murry to come over to Bingham's home to break up a party of "crack heads" who refused to leave Bingham's apartment. Shortly after Murry arrived at Bingham's apartment, the police burst through the door. They kept Bingham in his bedroom during the entire time the police were present. The police then told Murry that since he had a record they were going

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2 On March 8, 2005 Officer Allah Awadallah, who is mentioned in the Ricky Green summary, was indicted in the United States District Court (ED-Wis), Case No. 05-M-408, for allegedly threatening to plant cocaine on a suspect, Earl Cosey, unless Cosey obtained guns for Awadallah. Additionally, after Missouri's motion was denied by the trial court, motions were filed in the Milwaukee County case of ***State v. Lemar Barnes***, No. 2004CF001001, in which several additional witnesses were discovered who were prepared to testify that Officer Mucha planted drugs on them.

to "put the cocaine" on him.

On February 24, 2004 (twenty days after the incident) the undersigned wrote a letter to ADA Julius Kim asking the State to preserve the recordings of the telephone complaint concerning trespassing at Bingham's home and to make a copy for defense counsel. The State never responded to that request.

Moreover, private investigator Cindy Papka has been attempted to locate David Bingham since shortly after the incident. As recently as October 2, 2004 Papka reported to the undersigned that Bingham may have lived at 3433 N. Richards St., Milwaukee, WI but when she went there she learned that Bingham had left with no forwarding address and none of the neighbors knew where he went. Thus, Bingham is unavailable as a witness in the Murry case; and, likewise, would be unavailable as a witness in the present case.

D. **Lemar Barnes.** Lemar Barnes would testify that on February 23rd, 2004 he and a companion were standing outside of a duplex in Milwaukee. Officer Mucha and other officers approached them. The officer claimed to have found a bindle of cocaine on the ground near where Barnes was standing. When Barnes denied throwing the cocaine down the officers took him into the lower of the duplex. They handcuffed him into a chair and proceeded to verbally and physically abuse Barnes for approximately one hour. The physical abuse included punches to the face and pouring orange soda over Barnes' head.

On May 16, 2005 the trial court denied Missouri's motion for a new trial. The court wrote:

Defendant contends that had he been in possession of all of the above evidence, his motion to introduce "other acts" evidence would have been granted. Various reports from a defense investigator, Cindy Papka, which were provided to appellate counsel, are attached in support of defendant's motion. Two of the reports deal with Booker Scull and his girlfriend Lillian Brooks; the other concerns Lemar Barnes.

Before a new trial may be awarded based on a claim of newly discovered evidence, the defendant must demonstrate (1) that new evidence was discovered after the trial; (2) that the defendant was not negligent in failing to discover the evidence before trial; (3) that the evidence is material; (4) that the evidence is not cumulative; and (5) that there exists a reasonable probability of

> a different result at a new trial. State v. Coogan, 154 Wis.2d 387, 394-95 (1990); State v. Bovee, 75 Wis.2d 452, 457 (1977). While the defendant's proffered evidence satisfies the first four of the general requirements, the court finds that it is not reasonably probable that a different result would be reached in a new trial. For the same reasons set forth by Judge Lamelas in denying defendant's request to permit the testimony of Booker Scull, this court would find the testimony of the other persons inadmissible as well. The court would not permit the naked allegations to come in; therefore, all of the factual circumstances surrounding the arrests of the other people, what they were charged with, and what other witnesses saw would be necessary and would inevitably result in four or five mini-trials within the defendant's trial. Such evidence would mislead the jurors, confuse the issues, and consume valuable court time. Moreover, three of these people (Hamilton, Murry and Barnes) are in the midst of pending proceedings and face the same fifth amendment concerns that Scull faced previously. Regardless of this fact, the court finds that the evidence would be inadmissible based on the same analysis performed by Judge Lamelas (probative value substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury). Under the circumstances, the court declines to grant an evidentiary hearing on the defendant's current claims and denies his motion for a new trial.

(R:21-2, 3)

Missouri timely filed a notice of appeal to this court.

II. FACTUAL BACKGROUND

Officer Jason Mucha testified that on January 7, 2004 he was involved in a drug investigation in Milwaukee. (R:30-52) The suspect he was pursuing escaped and, at about that time, Mucha saw a white car pull away from the curb. (R:30-53).

Nearby, Mucha found a white Chevrolet Lumina parked in front of a house with a man in the passenger seat. (R:30-54, 55). According to Mucha, as the police approached the man ducked down under the seat. (R:30-56). Mucha then attempted to remove the man (later identified as Missouri) from the vehicle but, according to Mucha, Missouri then moved his hands to his mouth, leaned toward the steering while and started honking the horn. (R:30-58) At

that point Mucha physically pulled Missouri by his feet and got him out of the car. (R:30-59). Mucha claimed that Missouri was resisting and so Mucha delivered two "knee strikes" which caused Missouri to drop to the ground. (R:30-63) Mucha then jumped on top of Missouri. Eventually, police shot Missouri in the face with pepper spray. (R:30-106) Thereafter police claim to have discovered a baggie of cocaine bindles in Missouri's mouth.

Missouri, on the other hand, testified to a completely different course of events. Missouri told the jury that he was seated in the passenger seat waiting for a friend (the driver) who had run into the house to return a video. He saw the police approaching the car with their weapons drawn (R:31-50) and they shouted, "'Don't you f'ing move or I'll shoot you in the f'ing face" (R:31-51). At that point Missouri was struck in the back of the head with a hard object R:31-53) so he leaned over and began honking the horn so that there would be witnesses. (R:31- 54) Mucha then put his pistol to Missouri's neck and said, "Let go of the wheel or I'll blow your brains through the roof." (R:31-55) Missouri testified that he was violently pulled from the vehicle, beaten by the police, and that while he was on the ground they put the baggie of cocaine in his mouth. (R:31-57)

ARGUMENT

I. THE TRIAL COURT ABUSED ITS DISCRETION IN EXCLUDING BOOKER SCULL'S TESTIMONY.

A material issue, if not *the* material issue, at the trial of this case was whether or not Officer Mucha abused Missouri and planted drugs on him because Missouri was uncooperative in a police investigation. Booker Scull proposed to testify that he had an earlier encounter with Mucha in which he (Scull) was somewhat uncooperative with Mucha. As a result, Mucha struck Scull in the head with a hard object, jumped on him, and in the process two of Scull's teeth were broken. The trial court, while purporting to engage in the proper analysis of "other acts" evidence instead made an *ipso facto* predetermination that both Missouri and Scull were lying about Mucha's behavior; and, moreover, according to the trial

court's reasoning, mere citizens ought not be encouraged to make up false claims of police misconduct. Therefore, the trial court furthered this policy by excluding Scull's testimony. This was an abuse of discretion by the court.

Generally, circuit courts have broad discretion to admit or to exclude evidence and to control the order and presentation of evidence at trial. The appellate court will reverse only where the trial court has erroneously exercised that discretion. ***State v. Smith***, 254 Wis. 2d 654, 648 N.W.2d 15 (2002).

Sec. 904.04(2), STATS., provides:

> **Other crimes, wrongs, or acts**. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. This subsection does not exclude the evidence when offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Although the admission of other acts evidence is clearly within the trial court's discretion, to determine whether evidence of other acts is admissible, the trial court must engage in a three step analysis. First, the court must determine if the proffered evidence fits within one of the exceptions of RULE 904.04(2), STATS.; second, the trial court must determine if the other acts evidence is relevant under RULE 904.01, STATS.; third, pursuant to RULE 904.03, STATS., the trial court must decide whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice to the defendant. *See* ***State v. Sullivan***, 216 Wis.2d 768, 772-773, 576 N.W.2d 30, 32-33 (1998).

Here, Missouri testified at trial that once he was somewhat uncooperative with the police investigation Officer Mucha made unprofessional threatening remarks toward Missouri. Additionally, Missouri claimed that Mucha and the other officers were unusually violent with him and planted cocaine on him. On the other hand, Mucha claimed that Missouri resisted arrest and, therefore, it was necessary for the police to use force. Thus, the routine practice of the officers in handling these types of situations was plainly a

critical issue in the trial.

Booker was prepared to testify that he was on his porch minding his own business when he was approached by Mucha. When Booker was less cooperative than Mucha thought appropriate Mucha called Booker a nigger and struck him in the back of the head with a hard object. Booker was then jumped on by Mucha and, in the process, Booker had two teeth broken.

With the exception of the planting of drugs the two incidences bear a striking and disturbing similarity. Both attacks by Mucha were precipitated by a black suspect being uncooperative with an investigation. As a prelude to both attacks Mucha made threatening remarks. Both attacks began with a blow to the back of the head with a hard object and both attacks ended with Mucha jumping on the men while they were down.

Thus, the other acts evidence was offered for a permissible purpose under the statute; that is, to show intent, plan, and absence of mistake on the part of Mucha.

Plainly, Booker's testimony was relevant. In ***State v. Becker***, 51 Wis.2d 659, 666-67, 188 N.W.2d 449, 453 (1971) the court noted that in the courtroom the terms relevancy and materiality are often used interchangeably, but materiality in its more precise meaning looks to the relation between the propositions for which the evidence is offered and the issues in the case. If the evidence is offered to prove a proposition which is not a matter in issue nor probative of a matter in issue, the evidence is properly said to be immaterial.

Here, the material proposition is that Jason Mucha dislikes black people, he is unusually provoked by a lack of cooperation from such people, and he acts on this imagined provocation violently, and then claims that the people were resisting his lawful efforts at police work.

Obviously, Booker's proposed testimony makes this material proposition more likely to be true and, therefore, it is relevant.

The only remaining question, then, is whether the probative value of the evidence is outweighed by the unfair prejudice. The trial court focused its reasoning on this prong and it is here that the trial court's abuse of discretion is most evident.

The words of the trial judge amply illustrate the point. The judge said, "If I were to permit the defense to go in this way, then all of that would—all that that would do is inspire people to make claims of beatings by the police. That is inflammatory, and without anything really to back this up other than this allegation . . ." (R:29-8)

Plainly, the trial court's reasoning does not touch upon unfair prejudice- rather, it is a predetermination of credibility. The trial court's remark makes clear the judge's predetermination ("pre-adjudication" or "prejudice") that Booker Scull and Walter Missouri are, *ipso facto*, lying in their proposed testimony about the police brutality and misconduct. Put another way, the trial judge apparently believes, without any evidence having been presented in this case, that police *never* abuse suspects and *never* plant cocaine on them.[3] Additionally, the trial court's remark goes well beyond the confines of the present case and touches upon the judge's unreasonable fear that a ruling favorable to Missouri would prompt other defendants in other cases to also lie about police brutality.

There is, also, a somewhat more unsettling aspect to the court's ruling. Implicit in the trial court's reasoning is the assumption that police officers would not "risk their careers" by fabricating evidence and by abusing suspects. Put another way, the court assumes that the jury ought to believe police officers simply because they are humble servants of the public and that members of the public ought not be inspired to "make claims of beatings by the police." The reason this line of thought is so disturbing is because if enough people accept it there is no "risk" in police officers fabricating evidence and in abusing suspects. Any citizen who claims to have been abused by police will have to have that claim evaluated in a setting where it is the suspect's word against the

3 The folly of such a preconceived notion is that not long after the Missouri case Milwaukee Police Officer Allah Awadallah was tape recorded making a threat to do just that and is now under federal indictment.

word of one or more police officers. In that context, it is obvious who will win the battle of credibility. This is exactly what unscrupulous police officers rely upon. Only when a citizen happens to be pointing a video camera at such an incident, unnoticed by the police, do we have proof that suspects are, in fact, abused while in police custody. This should not be the only "proof" that is permitted by the courts, though.

When other people, with no apparent connection to one another, start making similar claims against the same police officer, this is very compelling evidence that a problem exists with the officer- virtually as compelling as a video or an audio recording. It is not unfairly prejudicial because juries are well-equipped to judge the credibility of the various witnesses.

Here, though, the trial court apparently recognized the compelling probative value of such testimony, characterized it as "inflammatory", and decided to exclude it as a matter of public policy because citizens ought not be encouraged to make claims of abuse against police officers. In other words, the court and not the jury should determine whether or not the claims of police abuse are true.

Obviously, the trial court's reasoning completely misses the point of the ***Sullivan*** analysis. It does not evaluate the proposed other acts evidence as it relates to the material issues in the trial. Rather, the court excluded it by making an *ipso facto* determination that the citizens were lying about Officer Mucha's behavior; and, further, the court believed it to be sound public policy to discourage citizens from making up such outrageous claims against police officers.

The "unfair prejudice" to which Sec. 904.03, STATS speaks does not include the reputation of the witnesses in the community at large. Rather, the "unfair prejudice" refers to the integrity of the fact-finding process during the course of the trial. To prevent Missouri from presenting the evidence was to do great violence to the fact-finding process.

For these reasons, the trial court sorely abused its discretion in excluding Booker Scull's testimony from the trial of this matter.

II. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING MISSOURI'S POSTCONVICTION MOTION FOR A NEW TRIAL BASED UPON NEWLY-DISCOVERED EVIDENCE.

Missouri made a motion for a new trial on the grounds of newly discovered evidence. The new evidence was the proposed testimony of several other witnesses who were prepared to testify that they had encounters with Officer Mucha that were very similar to Missouri's. To the extent Booker's testimony was excluded at the original trial because there was "nothing to back it up" the new witnesses provided the needed corroboration. Additionally, just like Booker's proposed testimony, the testimony of the new witnesses was offered for a proper purpose under Sec. 904.04, STATS to establish Mucha's standard practice in arrests of persons for possession of drugs.

In denying the motion for a new trial the postconviction judge found that Missouri's motion did relate to newly discovered evidence and that this evidence was relevant; the court denied the motion, though, finding that the newly discovered evidence would not have been admissible during trial because the testimony of the witnesses, alone, were merely "naked allegations", and completing the context of each situation would have required "mini-trials."

As will be set forth in more detail below, the other acts evidence was admissible. It would have survived the ***Sullivan*** analysis. Moreover, the trial court never made a finding that had the jury heard the newly discovered evidence it would have still found Missouri guilty.

The standard for deciding a motion for a new trial on the basis of newly discovered evidence is well-known:

> ". . . (1) The evidence must have come to the moving party's knowledge after a trial; (2) the moving party must not have been negligent in seeking to discover it; (3) the evidence must be material to the issue; (4) the testimony must not be merely

> cumulative to the testimony which was introduced at trial; and (5) it must be reasonably probable that a different result would be reached on a new trial."

State v. Herfel, 49 Wis.2d 513, 521-522, 182 N.W.2d 232, 237 (1971). The defendant must prove that these criteria are met by clear and convincing evidence. ***State v. Brunton***, 203 Wis.2d 195, 552 N.W.2d 452, 458 (Wis.App. 1996).

A motion for a new trial "is addressed to the trial court's sound discretion and [the appellate court] will affirm the [trial] court's decision if it has a reasonable basis and was made in accordance with accepted legal standards and facts of record." ***State v. Carnemolla***, 229 Wis. 2d 648, 656, 600 N.W.2d 236 (Ct.App. 1999).

After he was already convicted, Missouri discovered the existence of numerous other witnesses, none of whom have any discernable connection with one another, who were also prepared to testify that they were abused by Mucha and that Mucha planted drugs on them. All of these incidents occurred in close proximity to one another. Consequently, Missouri filed a postconviction motion seeking a new trial on the basis of newly-discovered evidence. To the extent that the trial court's original ruling concerning Booker Scull's testimony was based upon Booker's claim being "without anything really to back this up other than this allegation . . ." (R:29-8) then the newly-discovered evidence provides the needed corroboration. The more people who have observed Mucha behave in a certain way the more likely it is true that he does behave that way.

Nonetheless, the trial court once again denied Missouri. The court found that Missouri met the first four prongs of the analysis (newly discovered, not negligent, material, not cumulative) but denied the motion on the grounds that the newly discovered evidence would not have made a difference in the trial because the evidence would not have been admitted. The court reasoned that it would not have admitted the "naked allegations" of the witnesses (i.e. the relevant testimony of competent witnesses, under oath, as to personal knowledge they had of Mucha's behavior). Rather, the court would have required evidence of the full context of each

incident. This, the court found, would require five "mini-trials". A different judge decided the postconviction motion but, remarkably, adopted the reasoning of the first judge. The trial court wrote:

> For the same reasons set forth by Judge Lamelas in denying defendant's request to permit the testimony of Booker Scull, this court would find the testimony of the other persons inadmissible as well. The court would not permit ***the naked allegations*** to come in; therefore, all of the factual circumstances surrounding the arrests of the other people, what they were charged with, and what other witnesses saw would be necessary and would inevitably result in four or five mini-trials within the defendant's trial. Such evidence would mislead the jurors, confuse the issues, and consume valuable court time. (emphasis provided)

It is of the utmost importance to emphasize that the trial court's reasoning in denying the postconviction motion *did not* include a finding that if the other acts evidence were presented to the jury the jury's verdict would still be guilty. Additionally, the trial court did not find that the evidence was not offered for a permissible purpose under Sec. 904.04, STATS. Rather, the reasoning of the trial court rested upon the court's belief that the other acts evidence *would not be admissible* because it would require "mini-trials" (i.e. the evidence violated the third prong of the ***Sullivan*** analysis under Sec. 904.03, STATS).

As will be set forth in more detail below, the fact that the other acts witnesses might require "mini-trials" is not a lawful basis for excluding the evidence.

A. The testimony of the other acts witnesses is, by itself, admissible.

Once again, the sworn testimony of citizen witnesses concerning police misconduct is characterized by the court not as "testimony" but as "naked allegations". To the knowledge of the undersigned, there is no requirement of law that, as a foundation, the witness's testimony be accompanied by a video recording of the police misconduct before it is admissible (i.e. before it is no longer "naked"). Thus, there is no lawful basis for the trial court to declare that it would not have admitted "naked allegations".

Sworn testimony of witnesses cannot fairly be characterized as "naked allegations."

Testimony of witnesses is admissible if it is relevant and if a foundation is established that the witness has personal knowledge of what he speaks. *See,* Sec. 904.01, 904.02, and 906.01, STATS.

Plainly, the proposed testimony of the other acts witnesses is relevant and is offered for a permissible purpose under Sec. 904.04, STATS. The testimony tends to make it more or less likely that Officer Mucha abused Missouri and planted cocaine on him. In other words, it is offered to show the routine practice of Officer Mucha. The proposed testimony of Richard Green, Jr., Lemar Barnes, James Lee Murry all relate to actions of Milwaukee Police Officer Jason Mucha or others accompanied by Officer Mucha within a one year period of time and all within less than two miles of the location of the incident with Missouri. Each of these people proposed to testify that Mucha or an officer accompanied by Mucha falsely claimed to have seen them in possession of cocaine.

Missouri's offer of proof in support of his postconviction motion also establishes that each witness has personal knowledge of Mucha's behavior.

Thus, there is no basis for the court to declare that the "naked allegations" of the other acts witnesses would not have been admitted.

Rather, if the evidence were to be excluded at all it must be as part of the ***Sullivan*** analysis.

B. The other acts evidence could not be excluded on Sec. 904.03, STATS, grounds.

If the State decided to complete the story of each other acts witness by introducing "all of the factual circumstances surrounding the arrests" then so be it- but this does not make the other acts evidence unfairly prejudicial. Sec. 904.03, STATS prohibits the *needless* presentation of evidence, and prohibits evidence that might

confuse the jury, or evidence that might *waste time*. By the court's own comments, this additional contextual evidence would be needed to *avoid* confusing the jury, it would be necessary to put the incident into context and to permit the jury to fairly evaluate the testimony. The fact that "mini-trials" might be necessary is beside the point- such mini-trials might, in fact, be *necessary*. Nowhere does Sec. 904.03, STATS permit the court to exclude necessary evidence because it might make the trial take too long. Certainly Sec. 904.03, STATS does not authorize the court to exclude evidence because it might make the police officers look bad.

There is no way for the State, in responding to this brief, to spin the reasoning of the postconviction court into something it is not. There is no getting around the fact that the court would not grant a new trial because the judge personally did not believe what the newly-discovered witnesses were prepared to say and it would take too long to find out whether or not they were telling the truth. This is a rather cynical approach to the fact-finding process because at its core is the trial judge's belief that the other acts witnesses are lying but there is the possibility that the jury, being gullible, would believe the other acts testimony.

For these reasons the trial court abused its discretion in denying Missouri's motion for a new trial.

CONCLUSION

For all of these reasons it is respectfully requested that the court reverse Missouri's conviction and remand the matter for a new trial.

Dated at Milwaukee, Wisconsin, this _____ day of _____, 2005.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of the brief is 5652 words including footnote, tables, and cover.

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_____ day of _____.

_____

Jeffrey W. Jensen

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I
APPEAL NO. 2005PA001486-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

WALTER MISSOURI,

Defendant-Appellant.

DEFENDANT-APPELLANT'S APPENDIX

A. Record on Appeal

B. Oral ruling on admissibility of Booker Scull testimony

C. Memorandum Decision on motion for a new trial