FILED
08-20-2024
Clerk of Circuit Court
Brown County, WI
2022CF001066

STATE OF WISCONSIN CIRCUIT COURT BROWN COUNTY
BRANCH II

STATE OF WISCONSIN,

Plaintiff,

v. **Case No.: 22 CF 1066**

GUSTAVO CANTU,

Defendant.

DEFENDANT'S NOTICE OF MOTION AND MOTION IN LIMINE

TO: District Attorney David L. Lasee via E-filing.
Brown County District Attorney s Office
300 E. Walnut Street,
Green Bay, WI 54301

NOTICE OF MOTION

COMES NOW the Defendant, Mr. Gustavo Cantu, appearing specially by CASPER MEHLOS LAW GROUP, LLC, specifically Attorney Corey G. Mehlos, and reserving the right to challenge the Court's jurisdiction, will move the Court, Branch II, before the Honorable Judge Walsh, presiding judge, on a date and time to be set by the court, for an order allowing, excluding and/or limiting evidence to be presented at trial.

MOTION

NOW COMES The Defendant, Mr. Gustavo Cantu, appearing specially by CASPER MEHLOS LAW GROUP, LLC, specifically Attorney Corey G. Mehlos, and reserving the right to challenge the Court's jurisdiction, hereby moves the Court for an order allowing, excluding and/or limiting evidence to be presented at trial.
As to pre-trial orders, Mr. Cantu requests the following:

1. That the prosecution be prohibited from proffering expert testimony without an advanced ruling by the Court that the proffered evidence satisfies the foundational requirements of admissibility identified within Wis. Stat. § 907.02.

2. That the prosecution or its witnesses be prohibited from introducing, referencing or otherwise commenting on any out-of-court statements allegedly made by another person before a hearing is held, outside the presence of

the jury, to determine the admissibility thereof pursuant to the Defendant's rights under the Confrontation Clause of the Sixth Amendment to the United States Constitution and the U.S. Supreme Court's decision in *Crawford v. Washington,* 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).

3. The prosecution be prohibited from any mention or use of physical evidence not previously disclosed to defense counsel. Wis. Stat. § 971.23.

4. The prosecution be prohibited from introducing any evidence concerning alleged acts of criminal or civil misconduct or any "other acts" by the Defendant either prior to or subsequent to the date of the alleged incident forming the basis of the charge in the instant case without a pre-trial ruling by the Court. Wis. Stat. § 906.11; Wis. Stat. § 904.03.

5. That the prosecution be prohibited from any reference to or use of any statements allegedly made by any witnesses who the State intends to call in this case in which tends to inculpate the Defendant, and which have not previously been disclosed to defense counsel. Wis. Stat. § 971.23.

6. The prosecution be precluded from using or mentioning any statements allegedly obtained from the Defendant until an evidentiary hearing is held outside the presence of the jury to determine its admissibility. Wis. Stat. § 971.31(3).

7. Preclude testimony of fact and/or lay witnesses not disclosed in discovery within a reasonable amount of time before trial. Wis. Stat. § 971.23.

8. To impeach the credibility of State's witnesses, Mr. Jacob Ventura and Mark Helsel, during cross-examination based on specific instances of prior conduct that are probative of untruthfulness. Wis. Stat. § 906.08(2). Evidence of Mr. Ventural and Mr. Helsel's prior acts of dishonesty are admissible pursuant to Wis. Stat. § 906.08(2) because they are "probative of truthfulness or untruthfulness" for the purpose of either attacking or supporting the witnesses' credibility and "are not remote in time." The relevant statute provides:

> SPECIFIC INSTANCES OF CONDUCT. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witnesses' credibility…may not be proved by extrinsic evidence. They may, however, subject to s. 972.11(2), if probative of truthfulness or untruthfulness and not remote in time, be inquired into on cross-examination of a witness or on cross-examination of a witness who testifies to his or her character for truthfulness or untruthfulness.

Specifically, Mr. Ventura has previously been convicted of crimes indicative of dishonesty including: Resisting or Obstructing an Officer in Brown County Case No. 21 CM 718; Retail Theft in Outagamie County Case Number 20 CM State of Wisconsin vs. Jacob J. Ventura 718; Resisting or Obstructing An Officer contrary Brown County Case No. 20 CM 1069; Misappropriate ID contrary to Brown County Case No. 18 CF 170. Likewise, Mr. Helsel has been convicted of crimes indicative of dishonesty including: Drive or Operate Vehicle w/o Consent in Brown County Case No. 2018CF001081.

Mr. Cantu has satisfied the first foundational requirement for admissibility under Wis. Stat. § 906.08(2): that the specific instance of conduct falls into a range of behavior that is "probative of truthfulness or untruthfulness." *US v. Smith*, 80 F.3d 1188, 1193 (7th Cir. 1996) (FRE 608(b) permits cross-examination

into deceptive acts, including "acts of theft"); *US v. Zizzo*, 120 F.3d 1338, 1355 (7th Cir. 1997) (stealing tires is probative of untruthfulness); *US v. Wilson*, 985 F.2d 348, 351 (7th Cir. 1993) (bribery and failure to file federal income taxes is probative of untruthfulness); *US v. Fulk*, 816 F.2d 1202, 1206 (7th Cir. 1987) (deceptive practices that lead to surrendering chiropractic license is probative of untruthfulness). Specifically, both Mr. Ventura and Mr. Helsel engaged in multiple deceptive acts that are "probative of truthfulness or untruthfulness:" misappropriating a third party's identification, drive without owner's consent, retail theft, and obstructing an officer.

Evidence of a witnesses' dishonest conduct is particularly relevant, and greater latitude should be given to cross-examine a witness based on prior conduct involving dishonesty, when the crux of a case comes down to the credibility of witnesses who offer two competing alternatives and the jury is required to find one account credible in order to determine whether a crime has occurred. *Rogers v. State*, 93 Wis.2d. 682, 297 N.W.2d 774 (1980) ("more latitude should be given on cross examination" under sec. 906.08(2) when "the state's case depends upon the testimony of a single witness"); *United States v. Novaton*, 271 F.3d 968, 1006 (11th Cir. 2001) (presumption favors free cross-examination of the government's star witness on possible bias, motive, ability to perceive and remember, and general character for truthfulness); *State v. Cuyler*, 110 Wis. 2d 133, 327 N.W.2d 662 (1983) (reversing sexual assault and child enticement convictions in interest of justice based on erroneous exclusion of evidence offered under §906.08(1) to bolster defendant's credibility when witness credibility was critical issue at trial).

Because Mr. Ventura and Mr. Helsel are the State's two proffered witnesses who apparently plan to testify to Mr. Cantu's purported inculpatory statements, even though there is indicia of unreliability of their claims, and there is less likelihood for independent, corroborating evidence in a he-said, she-said case, the law affords greater latitude to examine her character for truthfulness. *Rogers v. State*, *supra*; *State v. Dorsey*, 2018 WI 10, ¶ 50, 379 Wis. 2d 386, 421, 906 N.W.2d 158, 175 ("Credibility is particularly probative in cases that come down to he-said-she-said"); *citing State v. Marinez*, 2011 WI 12, ¶45. The fact that the two witnesses were willing to commit dishonest acts of theft and/or outright lied to police officers within several years before making these allegations bears upon whether they are less likely to be truthful, or less credible, than the average witness who generally intends to tell the truth under oath when s/he pledges to do so.

For the reasons set forth above, Mr. Cantu has satisfied the first foundational requirement of admissibility under Wis. Stat. § 906.08(2): that the witnesses' conduct is "probative of truthfulness or untruthfulness."

Likewise, Mr. Cantu has satisfied the second foundational requirement of admissibility under Wis. Stat. § 906.08(2). The close proximity in time between the acts of untruthfulness and their statements to police in this matter, marked by several calendar years, satisfies the requirement that the proffered evidence is "not remote in time." Wis. Stat. § 906.08(2).

Accordingly the Court should grant Mr. Cantu's motion due to satisfying both foundational requirements of admissibility.

9. Additionally, the Court should admit evidence of the same witnesses' bias. Evidence of the witnesses' pending charges, or status on supervision, at the time the statements were made and/or at the time of their anticipated testimony at trial as admissible to assess their bias and "possible" motives for testifying false. *Refer to WIS-JI Criminal 300*; *see also* Wis.Stat. § 906.16 ("For the purpose of attacking the credibility of a witness, evidence of bias, prejudice, or interest of the witness for or against any party to the case is admissible"); *U.S. v. Abel*, 469 U.S. 45, 52 (1984).

Bias is defined as "the relationship between a party and a witness which *might* lead the witness to slant, unconsciously or otherwise, his testimony in favor of or against a party." *Id.* (emphasis added). Bias may be proven by offering evidence that demonstrates a "witness' like, dislike, or fear of a party, or by the witness' self-interest." Evidence offered to prove a witnesses' bias "is almost always relevant because the jury, as finder of fact and weigher of credibility, has historically been entitled to assess *all* evidence which might bear on the accuracy and truth of a witness' testimony." The "common law of evidence" has allowed a party to demonstrate proof of a witnesses' bias by "the showing of [] extrinsic evidence" during cross-examination). E. Clearly, McCormick on Evidence § 40, p. 85, 89 (3d ed. 1984) (emphasis added); *State v. Long*, 2002 WI App 114, ¶18, 255 Wis. 2d 729, 647 N.W.2d 884 ("Wisconsin law is in accordance with the principle set forth in *Abel*."); *State v. Williamson*, 84 Wis. 2d 370, 383, 267 N.W.2d 337, 343 (1978) ("The bias or prejudice of a witness is not a collateral issue and extrinsic evidence may be used to prove that a witness has a motive to testify falsely. . . . The extent of the inquiry with respect to bias is a matter within the discretion of the trial court."); *See also State v. Johnson*, 184 Wis. 2d 324, 338–41, 516 N.W.2d 463, 467–68 (Ct. App. 1994).

"Motive has been defined as the reason which leads the mind to desire the result of an act." *Id.* In *Johnson*, the Wisconsin Court of Appeals reversed the trial court's decision to exclude relevant and "fairly" considered prejudicial evidence that the accused's girlfriend possessed a "motive" to falsely accuse him of battery based on reportedly taking his property shortly after making the battery allegation against him to police. *Id.* The Court of Appeals explained that from the standpoint of the proponent of evidence (i.e. the accused), the evidence supported his theory of defense and assertion of innocence:

> Here, Johnson's theory of defense was that [the alleged victim] falsely accused him of assault so that after he was incarcerated she could misappropriate certain items of his personal property. To bolster this theory, he sought to introduce evidence that *within days* after his arrest, [the alleged victim] approached several of the people who were storing property for Johnson and attempted to claim the property as her own. Johnson did not seek to introduce the evidence to establish Petersen's propensity to behave in a certain way; he offered it as probative of Petersen's motive for falsely accusing him of the assault . . . We conclude that the evidence was relevant to a proposition of consequence other than Petersen's character . . . The evidence involved the relationship between the principal actors (Johnson and Petersen), followed on the heels of [the alleged victim's] accusations against Johnson, and, most importantly, traveled directly to Johnson's theory as to why [the alleged victim] was falsely accusing him . . . We are not satisfied that any of the[] [§ 904.03] considerations substantially outweigh the probative value of the evidence. Although other witnesses testified, this case essentially turned on the jury's assessment of the credibility issue drawn between [the alleged victim] and Johnson. Johnson's proffered evidence, if believed, offered a plausible scenario as to why [the alleged victim] might have falsely accused him. The jury's resolution of this credibility question might well have been influenced and assisted by this evidence. We observe that juries are many times required to address collateral events bearing upon the credibility of competing witnesses or their motives for testifying.
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> 338-341mphasis supplied).

Here, evidence of both witnesses' bias bias (i.e. adverse criminal interests in obtaining consideration for being perceived as helping law enforcement and the prosecution by implicating third parties) as well as their improper motives are relevant and admissible because they travels directly to Mr. Cantu's theory of defense: that both were facing significant exposure and/or wanted to cut their pending sentence and had incentive to mischaracterize evidence in a serious case to curry favor with law enforcement and reduce their criminal liability. *State v. Johnson*,

supra 338-341; Wis.Stat. § 906.16 ("**For the purpose of attacking the credibility of a witness, evidence of bias, prejudice, or interest of the witness for or against any party to the case is admissible**") (emphasis added); *U.S. v. Abel*, *supra*, ("the jury, as finder of fact and weigher of credibility, has historically been entitled to assess *all* evidence which might bear on the accuracy and truth of a witness' testimony") (emphasis added).

Accordingly, Mr. Cantu has satisfied his foundational requirements of admissibility under Wis.Stat. § 906.16.

10. Prohibit improper prosecutorial arguments, such as: relying on matters outside the record; personal attacks on the defendant or defense counsel, vouching for credibility of the witnesses, asking the jurors to put themselves in the place of the alleged victim ("golden rule" arguments), and comments on the defendant's silence.

11. Require the court reporter to record all proceedings in this case, including voir dire, opening statements, side-bar conferences, conferences in chambers, jury instruction conference, and closing arguments.

12. That the prosecution witnesses be sequestered from both the courtroom and each other for the duration of the entire trial, commencing with voir dire, and admonishing all prosecution witnesses not to discuss their proposed testimony or completed testimony with any other witness during the pendency of this trial.

13. That the prosecution be prohibited from calling as a witness, any person whom the prosecution knows, or should know through exercise of due diligence, has a criminal record and/or juvenile delinquency adjudications, unless that information has been disclosed to defense counsel prior to the witness taking the stand. Wis. Stat. § 971.23.

WHEREFORE the Defendant, Mr. Gustavo Cantu hereby requests that the Court grant an order that allows, excludes and/or limits the testimony and evidence as asserted above at trial. As for grounds, the Defendant relies on the Wisconsin Rules of Evidence or any other authority cited above.

DATED this August 20, 2024

Respectfully Submitted,
CASPER MEHLOS LAW GROUP, LLC
Electronically signed by:

/s/ Corey G. Mehlos

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Corey G. Mehlos
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