

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 23, 2013

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2013AP944-CR

Cir. Ct. No. 2012CF145

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RICHARD P. HESSIL,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Waukesha County:
JAMES R. KIEFFER, Judge. *Affirmed.*

¶1 BROWN, C.J.¹ A jury found Richard Hessil guilty of resisting an officer and failing to obey a traffic officer or signal, and he appeals. He claims

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2009-10). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

that the trial court erroneously exercised its discretion when it denied his motion to admit “other acts” evidence. Specifically, Hessil sought to use citizen complaints and police employment records to cast Village of Butler Police Department Lieutenant Brian Pergande’s character for truthfulness in doubt pursuant to WIS. STAT. § 904.04(2). But, as we will show, those incidents had absolutely nothing to do with truthfulness, except for arguably one instance, which would not be enough to warrant a dispute about his character for truthfulness. We suspect that the proffer was to show that Pergande was a bad person, which is not a permissible purpose under Wisconsin law. We also reject Hessil’s correlative claim regarding newly discovered evidence because that evidence had the same kind of deficiency as the rest of it. We affirm.

Facts

¶2 According to the criminal complaint, on January 28, 2012, Pergande observed Hessil driving with a burned-out headlight. Pergande recognized Hessil from past experience and believed him to be operating with a suspended driver’s license. Pergande also knew Hessil to be confrontational with law enforcement, as he considers himself a “sovereign citizen” and does not recognize the authority of police officers. Pergande activated his lights in an attempt to stop Hessil. Hessil did not stop and then rolled through a stop sign. Pergande next activated his siren and called for backup. Pergande observed Hessil travel through another stop sign and believed Hessil was attempting to get to his residence.

¶3 Upon reaching Hessil’s residence, Pergande observed Hessil’s garage door opening and believed Hessil would run as soon as he stopped his car so that he could get inside his residence before Pergande could reach him. Pergande stopped his squad car and yelled at Hessil. Hessil yelled back that

Pergande did not have authority to be on his property. Pergande believed he did have authority to be there and asked Hessil to step out of the garage. Pergande feared for his safety during this encounter because it was dark, lit only by the streetlights, and he was unsure if Hessil was armed. Hessil refused to leave the garage and placed his hands into his black leather jacket, while continuing to yell for Pergande to get off his property.

¶4 Pergande reached for Hessil, grabbing hold of his wrist. Hessil attempted to pull away and step toward the garage again. Pergande still had hold of Hessil's wrist and attempted to pull Hessil toward him. Pergande advised Hessil that he was under arrest, to which Hessil responded that Pergande could not arrest him and needed to get off his property. Pergande again told Hessil that he was under arrest and instructed him to stop resisting. Pergande then took Hessil to the ground, but Hessil rolled onto his stomach to prevent Pergande from being able to secure his arms. Pergande again instructed Hessil to stop resisting and told him to put his arms behind his back. Hessil continued resisting, and Pergande warned that if he did not stop, Pergande would initiate a knee strike. Hessil refused to comply again, and Pergande struck him with his knee.

¶5 At that point, Village of Butler Police Department Investigator Chad Rahn arrived to assist Pergande with the arrest. Rahn yelled at Hessil to stop resisting and also attempted to wrestle Hessil's arms out from underneath him. Rahn then delivered a knee strike to Hessil as well. Hessil struggled up to his knees and received another knee strike, after which he fell to the ground with Pergande on top of him. At this point, Pergande noticed Rahn lying on his side, holding his knee, and yelling for Pergande to get Hessil off of him. One of the officers struck Hessil with an elbow to get him to roll off Rahn's leg. The officers were then able to secure Hessil in handcuffs and call an ambulance for Rahn.

Rahn was diagnosed with a sprained MCL and was on medical leave for almost one month.

¶6 Hessil was charged with (1) one felony count of resisting an officer, causing soft tissue injury to officer; (2) one misdemeanor count of disorderly conduct; and (3) one misdemeanor count of failure to obey a traffic officer or signal. Count 1 was later amended to a misdemeanor for resisting an officer. Hessil pled not guilty to all counts and the case was set for a jury trial. Hessil filed a pretrial motion to admit evidence of citizen complaints filed against Pergande while he was employed at the Kenosha Police Department. Pergande resigned from the Kenosha Police Department. It is not clear if these complaints were the reason Pergande resigned, and the outcome of the proceedings in Kenosha are unknown.

¶7 Hessil also sought to admit employment records from Pergande's current position with the Butler Police Department. The evidence Hessil sought to admit included allegations of theft from an arrestee, excessive use of force during a traffic stop, inaccuracies and misstatements in reports, a profiling stop, entering a home without a warrant, and threatening family members of suspects with charges. Hessil now also seeks to admit a newly discovered newspaper article alleging nonspecific misconduct involving pornography at the Butler Police Department and by Pergande. Hessil argues that this evidence was relevant to Pergande's character for truthfulness and should have been admitted at trial under WIS. STAT. § 904.04(2) as other acts evidence. The trial court denied the motion, reasoning that even assuming the evidence was relevant, it was more prejudicial than probative.

¶8 As we noted before, the jury found Hessil guilty of resisting an officer and failing to obey a traffic officer or signal. He was found not guilty of disorderly conduct.

Standard of Review

¶9 A trial court's determination to admit or exclude evidence is a discretionary decision that will not be upset on appeal absent an erroneous exercise of discretion. *State v. Jenkins*, 168 Wis. 2d 175, 186, 483 N.W.2d 262 (Ct. App. 1992). We review evidentiary issues to determine if the trial court applied the correct law to the relevant facts and reached a reasonable conclusion. *State v. Smith*, 2002 WI App 118, ¶¶7-8, 254 Wis. 2d 654, 648 N.W.2d 15.

The Five Instances Which Allegedly Show Pergande's Aggressiveness and Motive to Lie About It

¶10 The first issue is the trial court's decision to deny the admissibility of Pergande's employment records. Hessil argues that his case is essentially the same as *State v. Missouri*, 2006 WI App 74, 291 Wis. 2d 466, 714 N.W.2d 595, where this court ordered a remand because the trial court erroneously excluded other acts evidence going to the character for truthfulness of a police officer. *Missouri* involved a drug arrest where the defendant claimed that the arresting officer had assaulted him for no reason and then planted drugs in his mouth. *Id.*, ¶3. The officer had a different version—that he saw the defendant being involved in suspicious activity indicative of a drug buy and that he went to investigate the activity and was met with physical resistance necessitating a physical response. *Id.*, ¶4. After the defendant was subdued, a baggie of cocaine was found in the defendant's mouth. *Id.* Missouri wanted to put in testimony of another person, who claimed that he and his girlfriend had also been attacked by

the same officer for no justifiable reason. *Id.*, ¶¶5-8. He wanted to show that the officer's character for truthfulness, denying that he instigated a physical assault, was in doubt. *Id.*, ¶9. The trial court refused to admit it. *Id.* At postconviction proceedings, Missouri brought in evidence of four other instances of unprovoked physical assault, including one where the witness claimed that contraband was planted on his person by the officer. *Id.*, ¶10. The trial court refused to recognize it as newly discovered evidence material to the case and also confirmed its evidentiary ruling at trial. *Id.*, ¶11. This court reversed. *Id.*, ¶12. It held that the proffered evidence was relevant to a consequential fact in that the officer might have a motive to lie about unprovoked attacks on citizens. *Id.*, ¶22. It also held that the four newly discovered witnesses could be called. *Id.*, ¶24.

¶11 We agree with one commentator that, although it framed its analysis in terms of WIS. STAT. § 906.08(2), *Missouri* “is best analyzed as an instance of permissible bias (blatant self-interest) impeachment.” 7 DANIEL D. BLINKA, WISCONSIN PRACTICE SERIES § 608.2, at 482 n.4 (3d ed. 2008). Under § 906.08, a witness's character for truthfulness or untruthfulness may be inquired into, “limited to specific instances of untruthful conduct” such as fraud, misrepresentations, or lying. *Id.*; see also, e.g., *McClelland v. State*, 84 Wis. 2d 145, 155-56, 267 N.W.2d 843 (1978). In *Missouri*, the evidence the defendant sought to present was more relevant to establishing the officer's alleged pattern of similar misconduct and specific motivation to lie about it than to establish that the officer had a reputation or known character of untruthfulness.

¶12 In deciding as it did, the *Missouri* court reviewed the trial court's application of the three-step test for other acts evidence. We repeat that test here because we also must review the trial court's application of that test to the facts here:

(1) Is the other acts evidence offered for an acceptable purpose under Wis. Stat. § (Rule) 904.04(2), such as establishing motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident?

(2) Is the other acts evidence relevant, considering the two facets of relevance set forth in Wis. Stat. § (Rule) 904.01? The first consideration in assessing relevance is whether the other acts evidence relates to a fact or proposition that is of consequence to the determination of the action. The second consideration in assessing relevance is whether the evidence has probative value, that is, whether the other acts evidence has a tendency to make the consequential fact or proposition more probable or less probable than it would be without the evidence.

(3) Is the probative value of the other acts evidence substantially outweighed by the danger 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? See Wis. Stat. § (Rule) 904.03.

State v. Sullivan, 216 Wis. 2d 768, 772-73, 576 N.W.2d 30 (1998) (footnote omitted). Looking at this case, Hessil is claiming that Pergande was the aggressor. He asserts that Pergande's testimony about what happened regarding the altercation near his garage is a lie and argues that these other acts are relevant and probative to what he wanted to prove to the jury. But are they relevant and probative? We take a look.

¶13 One incident involved a claim that Pergande stopped the witness for driving without lights on at night but violated numerous traffic laws in making the stop. What this has to do with a motive to lie about his aggressiveness we do not know. Even if it were relevant, this was an unsubstantiated allegation, and the prejudicial effect of its admission would have greatly outweighed any probative value it could have had.

¶14 In a second incident it was alleged that, when Pergande was with the Kenosha Police Department, he had stolen \$93 from a purse belonging to a woman being arrested on a drug charge. Notwithstanding the fact that there was no proof other than the woman's say-so, it has nothing to do with Pergande's alleged penchant for unprovoked aggressive behavior. Moreover, as with the first incident, allowing questioning or admitting evidence concerning this incident would have only created a confusing, distracting minitrial, resulting in unfair prejudice that outweighed any possible probative value.

¶15 A third incident involved a similar account—this one involving \$417 allegedly having been stolen from a defendant's wallet. Again, this allegation has nothing to do with a motive to lie about the sequence of the physical altercation involving Hessil, and again its unsubstantiated nature meant that it posed a great risk of unfair prejudice, even if it had any probative value, which we do not think it does.

¶16 In a fourth incident, it was alleged that Pergande illegally profiled a person during a traffic-related incident, entered that person's home without permission, threatened a family member with charges, and lied in his incident report about the matter. Once again, this says nothing about any motive to lie about Pergande's aggressive nature and posed a great risk of prejudice in Hessil's trial.

¶17 The fifth incident involves a driver who was charged with a third-offense of operating a vehicle while intoxicated. Apparently, the driver yelled out a curse word to Pergande while passing by Pergande and Pergande chased him, stopped him, and then tasered him when he did not surrender his driver's license. This one does go to unprovoked aggressiveness. So, it meets the second *Sullivan*

prong while the others did not. But just as the trial court ruled, it fails on the third prong. First, it is only one complaint. That hardly shows a penchant for unprovoked violence and lying to cover it up. It does not show that Pergande is the doppelganger of the officer who allegedly assaulted Missouri and numerous others. Second, we have no idea as to the outcome of the complaint. It was a mere allegation by a person subject to a third-time operating while intoxicated charge. We do not know if that person's credibility was tested by cross-examination or anything else about it for that matter. The trial court's ruling was well within the bounds of discretion.

¶18 In sum, Hessil submitted only one incident that has any relationship to the unprovoked, intimidating, aggressive, and excessive force allegation during his traffic stop. Not only is it only one complaint of which we do not know the outcome, if evidence of this complaint were admitted, the trial court would need to preside over a trial within a trial. We agree with the trial court that this would distract from the question of whether Hessil is guilty of the charges alleged against him. Because the complaint is unsubstantiated, it is inherently unreliable and could only unfairly prejudice the jury.

Newly Discovered Evidence of Misconduct Does Not Require a New Trial

¶19 Hessil also argues that newly discovered evidence of Pergande's misconduct requires a new trial. Hessil cites an article in the Milwaukee Journal Sentinel about reports that Butler police officers watched pornography at the station house while on duty and that Pergande engaged in misconduct in office. Hessil argues that because this evidence is of the same character as the evidence he sought to introduce at trial, it could assist the jury in making a credibility determination as to Pergande's testimony. We rejected Hessil's prior argument

about four of the incidents because they were in no way similar to the character trait that Hessil was trying to show the jury. This newly discovered evidence is equally dissimilar. Because this argument is based upon the same argument that we have already rejected, we conclude that justice does not require remand.

By the Court.—Judgment affirmed.

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

