

STATE OF WISCONSIN : CIRCUIT COURT : MILWAUKEE COUNTY

STATE OF WISCONSIN,

Plaintiff,

v.

Case No _____

NAME CLIENT,

Defendants.

**MOTION TO ADMIT GUN POSSESSION AND OTHER ACTS EVIDENCE BY
DECEASED AND PROSECUTION WITNESS**

TO: DISTRICT ATTORNEY
MILWAUKEE COUNTY, WI

NOTICE IS HEREBY GIVEN that on _____ Mr. Client, the defendant, by counsel, _____, will, and hereby does, move the Court for an order will move the court in limine pursuant to §§.904.04(2) and 904.06 and the United States and Wisconsin State Constitutions to admit evidence of the deceased's character for and habit of carrying a firearm. The purpose of this testimony is to prove that the deceased, (name), produced the firearm which eventually caused his death.

I. Basic Facts and Trial Issue:

Mr. Client is charged with First Degree Reckless Homicide for an incident that occurred on (date). Mr. Client drove in his car to (address) to meet (name deceased) and (name witness) in Client's car for a drug exchange. The prosecution theory of the case is that Mr. Client arranged to buy marijuana from (name witness and deceased) but instead attempted to rob Deceased and shot him during or immediately after a struggle over the gun. The state's entire case is based on Mr. Witness' testimony; there were no witnesses other than Witness and Mr. Client who observed what occurred inside the car.

Mr. Client's version of the case is completely different. Mr. Witness had earlier contacted Mr. Client to purchase some marijuana. Mr. Client went to the pre-arranged location where Mr. Witness and the deceased, entered Mr. Client's car. Mr. Witness got in the front passenger seat and Mr. Deceased got in the rear seat. Once in the car, Mr. Deceased produced a handgun and tried to rob Mr. Client. Mr. Client successfully disarmed Deceased and two shots were discharged from the gun. One of the shots hit the rear car door and the other hit Mr. Deceased in the head, causing his death. After the shots were fired, Mr. Client left the scene. He did not learn that Deceased had died until sometime later.

It is fair to say that a jury decision as to whether or not Mr. Client is guilty will turn on which version of the facts the jury believes; Mr. Witness' or Mr. Client's. Mr. Witness' credibility will be vigorously challenged by the defense; he gave eight different versions of what occurred as outlined in the next section of this motion. The defense also wishes to bring is evidence of specific occasions where both Witness and Deceased possessed or claimed to possess firearms or threatened to use firearms; the specific information the defense wishes to admit is outlined in section III of the motion. Section IV will discuss the pertinent law.

II. Mr. Witness' Differing Versions

After the shooting Mr. Witness fled the scene. When police arrived they soon determined that he was a witness to the shooting. Mr. Witness was arrested two days later and questioned by the police. All together he has told eight different stories about the homicide, none of which are truthful. These stories are:

Version One: Immediately after the shooting Witness called Mr. Deceased's mother, and claimed he was driving by when he saw Deceased's body lying on the curb line. In this version he denied knowing anything about how Deceased was shot. Ms. Harmon handed the phone to a Milwaukee police officer; Mr. Witness repeated this story and gave a false name and date of birth to the officer.

Version Two: Mr. Witness placed an additional call to deceased's mother. This time he told her that he had just met Deceased and he and Deceased were passengers in a red car with other occupants who were Deceased's friends; Witness denied knowing these people. Mr. Witness was in the front passenger seat, Deceased was in the rear passenger seat, and the other rear passenger

took out a gun and pointed it at Deceased. A struggle ensued, Mr. Witness fled the car and heard a shot being fired. He returned to the scene and saw Deceased's body on the curb line.

Version Three: Witness was arrested and interrogated by Milwaukee police detective on (date). Witness stated he got together with Deceased who used Witness' phone and then told him he had to "bust a move". In this version Witness claimed that he and Deceased were on foot, that they got in a red car and Deceased introduced him to the car's occupants. Witness claimed he had a brief conversation with the driver and was "chilling" until he heard Deceased state, "On the four, bitch-ass niggas" (which Witness explained to police is an expression used by Vice Lords). He then saw the driver with a gun pointed at Deceased, who was trying to disarm the driver. Witness claims that he also tried unsuccessfully to grab the gun, but was stopped by the unknown person in the back driver's side of the car who partially knocked off his glasses. Witness stated that he heard a gunshot, got out of the car, and heard another shot while running. He returned and saw Deceased on the ground and then ran home. Police showed Witness three photo arrays, one of which contained a picture of Mr. Client. Mr. Witness did not identify anyone but did tell police that another person in a different photo array looked familiar. During this interrogation police repeatedly questioned Witness and made it clear that they didn't believe his version.

Version Four: Witness was re-interrogated by different detectives and gave a similar version to #3. Eventually he stated that a person in the photo array he's seen during the first interrogation was of someone who he thought he recognized but he wanted to see better photos. He deliberately misidentified one of the filler photos in the array (not the same person he claimed to recognize the day before).

Version Five: The second interrogation continued and detectives then showed Witness Mr. Client's car which was in the police garage. Witness had asked for higher quality photos and was shown a new array. He verbally identified Mr. Client but then claimed he could not be sure and marked no identification on the written identification procedure document. He also consented to an examination of his cell phones. He then identified Mr. Client as the shooter but retracted his identification when asked to sign the form documenting it. He continued to maintain that only Deceased and the shooter were connected and that he was not familiar with Mr. Client. He identified Client from a photo array and then retracted his identification.

Version Six: While being taken to the police lockup, Witness began crying, claimed he was afraid of the shooter and said he was prepared to make an identification. Witness re-identified

Mr. Client and now claimed that he did know him previous encounters but still claimed that the meeting was arranged by Deceased and that he had nothing to do with any drug sale or exchange.

Version Six: Witness was interrogated again on October 4th after police had examined his cell phone showing that he had several phone calls between him and Mr. Client both prior to and after the shooting. Witness now admitted knowing Mr. Client but still claimed he had no involvement in any drug transaction between Mr. Client and Deceased. Witness claimed he was threatened by Client and fearful of him as an explanation for his previous lack of identification.

Version Seven: Witness was interview by his DOC agent on (date). He stated that Deceased told him he had to meet “these dudes”. He omitted that he was acquainted with Mr. Client. He claims that after the shot was fired he saw the shooter get out of the car and thought he was going to shoot him, a statement he never gave to police. He was also untruthful about what happened when arrested by police on (date).

Version Eight: Witness testifies at the preliminary hearing that he does not know why the meeting in the car took place. He states Mr. Client had the gun pointed at Witness, not Deceased, and that Deceased was trying to save Witness’ life.

None of the versions Witness gave police correspond with call records of Deceased, Witness and Client’s cell phones later obtained by the Milwaukee police department.

III. Evidence the Defense Seeks to Admit

The defense theory of the case is that Deceased and Witness arranged to meet Mr. Client to rob him at gunpoint, that Mr. Client disarmed Deceased and that the shots were fired accidentally. Mr. Deceased had a lengthy criminal record with criminal charges on CCAP. The relevant incidents as to Mr. Deceased are:

- Deceased possessed a firearm in (date); he was convicted for that possession in (date) in case # _____ Possession of a Firearm by a Convicted Felon.
- On (date), three weeks before this homicide, police received a tip that Deceased was in possession of a firearm. They stopped his car and found a .40 caliber semi-automatic pistol concealed in a baby car seat in the trunk of the car.
- On (date), a former girlfriend of Deceased’s filed a petition for a domestic abuse restraining order against Deceased. In the petition she wrote that Deceased had threatened to shoot her or shoot any other man she was with.

The relevant acts as to Mr. Witness are:

- In (date) Mr. Witness possessed a .40 Glock handgun. He also gave a false name to police.
- Mr. Witness was on supervision at the time of the offense.
- One week before the shooting Mr. Witness, who was on extended supervision, removed his DOC issue electronic monitoring bracelet.

IV. Legal Argument

A defendant has a constitutional right under the Sixth Amendment and the corresponding section of the Wisconsin Constitution to present a defense, *Chambers v. Mississippi*, 410 U.S. 284 (1977), *State v. St. George*, 2002 WI 50. Failure to allow the proposed testimony would impinge on that right.

There are three separate and distinct evidentiary reasons the court should admit the above evidence. As to Mr. Deceased, evidence of his prior possession of and threats to use firearms, is admissible under Wis. Stats. §904.06 as habit evidence. As to both Deceased and Witness, the defense seeks to admit evidence of firearm possessions and threats to use firearms under Wis. Stats. §904.04(2). Finally, as to Mr. Witness, the defense additionally seeks to admit the other acts to challenge his credibility and motive to falsify.

a. Habit Evidence

Wis. Stats. §904.06(1) provides that evidence of a habit of a person, whether corroborated or not, is admissible to prove the conduct of the person on a particular occasion. Wis. Stats. §904.06(2) states the method of proof may be by opinion or specific instances of conduct.

“Evidence of a person's habit is relevant because that evidence makes it more probable that the person acted consistent with that habit”, *French v. Sorano*, 74 Wis.2d 460 (1976). There is no minimum requirement regarding the number of times a person is engaged in a habit; *Id.* at 466-67, the court allowed just one instance; in *Chomicki v. Wittekind*, 128 Wis.2d 188,196-97 (Ct. App. 1985) the court held that four instances of conduct (sexual harassment in that case) were sufficient.

The defense request to admit this evidence presents a similar situation to District One's holding reversing a conviction in *State v. White*, 2004 WI App 78. The defendant in that case was charged with armed robbery of a store clerk and proffered evidence that the clerk was stealing money from the store in order to show an innocent explanation as to why the clerk handed him cash from the register. The court of appeals noted that the clerk's thefts were not remote in time, and undermined his explanation of why he gave the defendant money from the register. The court further noted that this testimony went to the core of the defense and its probative value was not substantially outweighed by the danger of unfair prejudice, *Id.* at ¶17.

b. §904.04(2) Evidence

Wis. Stats. §904.04(2) provides for the admissibility of other acts evidence if it is for an acceptable purpose. The defense is seeking to admit Deceased's prior possession of and threats to use firearms on the issue of his motive, opportunity, intent, and identity as the person who produced the firearm while attempting to rob Mr. Client at gunpoint. Other acts evidence is equally applicable to prove something about a person other than a defendant and is not limited only to a defendant's acts. *State v. Kimpel*, 153 Wis.2d 697, 703 (Ct. App 1989). The three part test for admission of other acts evidence is found in *State v. Sullivan*, 216 Wis.2d 768 (1998). The evidence must be offered for a permissible purpose under § 904.04(2); the evidence must be relevant under § 904.01; and the probative value of the evidence must not be substantially outweighed by the danger of unfair prejudice, confusion of the jury or needless delay.

The proffered evidence is for an admissible purpose; the fact that Deceased and Witness carried firearms, particularly when involved with drugs, is proof of motive, opportunity and intent as well as their identity as the parties that introduced firearms into the transaction. The evidence is clearly relevant. Evidence is relevant if it tends to make the existence of a fact that is determinative to the action more probable or less probable, Wis. Stats. §904.01. This is a low hurdle, evidence is relevant if it "tends to cast any light on the controversy", *White, Id.* at ¶14. In *White*, the court also held under the *Sullivan* standard that evidence that the alleged robbery victim sold marijuana was relevant to show that he was giving the defendant money to pay for a drug sale, ¶20. Finally, as the *White* court noted, the probative value is not substantially outweighed by the danger of unfair prejudice.

Mr. Witness' probationary status and his non-compliance is clearly admissible. A witness's probationary status is relevant because it and the fear of possible revocation are pertinent to the material issue of whether the witness has "ulterior motives" to shape his or her testimony, *Davis v. Alaska*, 415 U.S. 308 (1974). A defendant must be able to proffer specific evidence of such so the jury can assess why the witness might be testifying falsely, attacks on credibility will often be perceived by the jury as "a speculative and baseless line of attack." *Id.* at 318. The failure to admit an alleged victim's probationary status formed part of the basis for overturning a defendant's conviction in *State v. White*, 2004 WI App 78.

This motion is made subject to jurisdictional objections.

Dated at Milwaukee, Wisconsin, this _____

Respectfully submitted,
MR. CLIENT, Defendant

By: _____
Name Attorney
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