STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal No. 2012AP0839 CR

STATE OF WISCONSIN,
Plaintiff-Respondent,

v.

CURTIS E. FORBES,
Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN THE CIRCUIT COURT FOR COLUMBIA COUNTY, THE HONORABLE ALAN J. WHITE PRESIDING

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT, CURTIS E. FORBES

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ISSUES PRESENTED

I. The circuit court ruled that police violated Forbes's 4th Amendment rights by illegally remaining in his home, without consent, after he had been arrested and removed from the home pursuant to a warrant for his DNA. After Forbes was removed, officers remained in the home and interrogated Forbes's wife, Debra, for seven hours. Based on this 4th Amendment violation, the court suppressed Debra's statements. The court later ruled, however, that these statements were admissible to impeach her trial testimony.

   Did the circuit court err in admitting Debra's illegally obtained statements for impeachment purposes?

II. Did the circuit court err in preventing the defense from presenting certain evidence implicating an alternate suspect?

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Forbes requests neither oral argument nor publication, because the briefs will adequately address the issues, and because the issues can be decided based on settled law.

STATEMENT OF CASE AND FACTS

The Murder and the Initial Investigation in 1980

On March 11, 1980, at approximately 7:15 A.M., Lane McIntyre called his mother and told her that his eighteen year old wife, Marilyn McIntyre, had been murdered in their living room (164:1189). Lane's mother called the police (164:1189).

Investigators arrived and examined the body. The medical examiner concluded that the time of Marilyn's death was any time within 24 hours of the investigators' arrival (which was approximately 10:45 A.M. on March 11, 1980) (146:34). The investigators on the scene permitted Lane to leave with his mother (161:438). He was given a sedative and allowed to sleep at his parents' house (160:72,84;161:438).

The victim's autopsy revealed that she had been "savagely" beaten in the head area, strangled, and stabbed in the chest by a kitchen knife (146:12). The knife came from the McIntyre residence (164:1230). The police investigation found no sign of forced entry (163:1006). The coroner also noted older, unrelated injuries on the victim's body (160:35-36). These injuries involved scratched knees and a bruise in the vaginal area (160:35-36).

In the time period shortly before the murder, Lane committed several violent acts against the victim (44;58;152:7-14).[1] Approximately three months before the murder, Lane became angry with Marilyn at a Christmas gathering and beat her in front of family (44;58;152:7-14). The weekend prior to Marilyn's death, witnesses saw Lane attack Marilyn outside a friend's residence (44;58;152:7-14). He struck her in her face, knocking her to the ground (44;58;152:7-14). As she attempted to crawl away on a gravel driveway, Lane kicked her from behind in her vaginal area (44;58;152:7-14). During a separate incident, Lane punched a hole in a bar wall after he fought with Marilyn outside the bar (44;58;152:7-14). Lane purchased a life insurance policy on the victim three days before her death, and collected $10,000 upon her death (164:1213-1216).

[1] As explained in more detail in section II of the "Argument" below, the circuit court excluded some of this evidence concerning Lane McIntyre.

Lane's pattern of spousal abuse continued into his second marriage (58:3). In an interview with law enforcement, Lane described an incident with his second wife, in which he grabbed her by her throat and lifted her from the ground by her neck (44;58;152:7-14). Lane did this because, as he put it, "I'm the man of the house. Nobody's taking that away from me" (44;58;152:7-14).

At around 10:30 p.m. the night before the victim was found dead (within the time-of-death window described by the coroner), neighbors in the upstairs apartment heard Lane and the victim arguing loudly (161:322-323,341-342). The upstairs neighbor specifically recognized Lane's voice (161:323). She testified that she had heard the McIntyres fighting in the past, especially if they had been drinking (146:75). A neighbor adjacent to the McIntyre residence also heard an argument shortly after 10 P.M (161:341-342; 349). Though Lane has always maintained that his wife must have been killed early in the morning of March 11 after he went to work for the late shift that night, he put March 10 as the date of death on her headstone (160:438-439;164:1240-1243).

Early in the investigation, Lane was instrumental in casting suspicion on his friend, Curtis Forbes (164:1225-1226;54:7) Lane requested a meeting with law enforcement, and told them, "Curtis Forbes would be the first suspect in his mind concerning Marilyn's Murder" (164:1225-1226;54:7).

Police thus investigated Forbes as a possible suspect in the days after the murder. According to officers, Forbes gave them "no holds barred" access to his truck two days after the homicide (160:194). Police seized a sweater Forbes had been wearing on the night of the murder, as well as a wooden boat oar which Forbes kept in his truck (44:3). No blood, hair, skin or any other biological substances from the victim were found

on these items (44:3). Forbes also voluntarily provided a hair sample, and consented to an interview (160:194-199).

When it became clear to Forbes (who was 18 years old at the time) that police were considering him a suspect, he briefly left the area. Shortly after he left, he sent letters to Lane McIntyre, Debra, and his parents. In each letter, he said that he did not commit the crime and did not want to go to jail for something he did not do (162:592,593,595). Several months later, he came back to the area on his own accord (162:713). Upon his return, he told police that he had left because they "were accusing him or were considering him as a suspect" (176:Ex.2). He said that he had unpaid bills and had just broken up with Debra (his girlfriend at the time who later became his wife) (176:Ex.2).

Police in 1980 did not arrest Forbes, or anyone else, for the murder. From 1980 until 2008, Forbes lived continuously in the Columbus area (162:715:716;169:56-57). He married and raised his children there (162:715-716;169:56-57). He set up and ran his own business (163:1110;169:56-57). He was not convicted of any crimes (168:51-52).

The 2008-2009 Investigation

In 2008, police reopened the investigation and arranged for DNA testing of various samples.[2] As part of this process, police obtained a warrant to collect a DNA sample from Forbes (33:1). In the course of serving that warrant, officers entered Forbes's home, arrested and removed him from the home, and then remained in the home to interrogate

[2] The results of the DNA testing became the subject of a pre-trial hearing (153). The State argued that it should be allowed to present evidence that Forbes was not excluded from a sample found in the bathroom sink, but the circuit court excluded the result as inconclusive (153:43-44).

his wife for approximately seven hours (150:305-307). As explained in more detail below, the circuit court ruled that the officers violated Forbes's 4th Amendment rights by remaining in the home without consent after Forbes was arrested and removed (33;App.B).

The events leading to that interrogation began early on March 24, 2009, when police gathered at a church in preparation for serving the warrant on Forbes at his house (33:1). The plan, according to one of the detectives, was for approximately 10 officers to meet at the church, go to Forbes's residence, arrest him, and then interrogate Debra (149:38). As Forbes was driving away from the house to go to work, police pulled him over and informed him that they had a warrant to collect his DNA (33:1-2). Forbes agreed to accompany them, but asked if he could drop his car back at his home and make work arrangements (33:2). Police agreed and followed him back to his home.

Forbes went in to his home, and police followed him in (33:2). Forbes attempted to explain the situation to his wife, who had just woken up and was still in her nightclothes (150:223). Additional officers arrived and entered the house as well (33:3). After approximately half an hour, officers handcuffed Forbes, removed him from the house, and drove him away (33:3). Police did not take Forbes to a medical facility to obtain his DNA; instead, he was taken to the police station and interrogated (33:3).

After several officers removed Forbes from the home, other officers did not leave (164:1031). Rather, they remained in the home and interrogated Forbes's wife (150:305-307).

Police admitted that they employed a variety of interrogation techniques on Debra in an attempt to obtain incriminating information (163:840-857). One such strategy

was isolating Debra from her allies and the people close to her (163:853). The interrogators told Debra they had "indisputable" physical evidence of Forbes's guilt, and they therefore said that Debra's life as she knew it was "over" (176:Ex.12:212,22,72,79)[3]. They said repeatedly: "He's taken care of. He's done. He's not coming back and you need to accept that and figure this out. He's not coming back. He's going to jail" (*See, e.g.,* 176:Ex.12:2,3,4,12,22,72).

The interrogators repeatedly told Debra that she was a suspect, threatened that she could be charged as party to the murder, and said she would go to jail as well. The interrogators said: "You could be arrested and charged with a crime, party to the crime of homicide, because of your assistance back 29 years ago" (176:Ex.12:6). They told her: "It has been decided that you could potentially be charged with party to the crime of homicide" (176:Ex.12:16). The interrogators admitted they told Debra that others were pressuring them to charge her, but that they could resist this pressure if Debra gave them information (163:863:865). The interrogators admitted they were lying about this (163:863-865).

The interrogators also attempted to turn Debra against her husband by telling her that he had repeatedly cheated on her ("you've been loyal to him and he hasn't always been loyal to you"), and by telling her that he had impregnated another woman while Debra was in the hospital giving birth (to a child who later died) (176:Ex.12:12-14). They told Debra that it was her responsibility to take care of her son and daughter, and she could only do this by giving a statement and staying out of jail (176:Ex.12:14). They said, "Now it

[3] Document 176, Ex. 12 is the transcript of Debra Forbes's recorded interrogation. The transcript in this Court's file does not have page numbers. Undersigned counsel has thus hand-written page numbers on counsel's own copy, and cited the document accordingly.

isn't going to do you any bit of good to be going to Portage [County Jail] is it?" (176:Ex.12:6).

The detectives admitted that they explicitly pressured Debra to confirm their version—that Forbes came home at 4:00 A.M. the night of the murder, and that Debra woke up and saw blood on him (176:Ex.12:7,12,38;163:855-856,894). When one of the interrogators asked Debra what time she woke up that night, she said, "I don't know, morning I suppose" (176:Ex.:12:7). The interrogator responded, "But you didn't wake up the next morning. You woke up in the middle of the night" (176:Ex.:12:7). Later, when Debra said she woke up at 2:00 A.M., not 4:00, the interrogator said, "No, we know all about the whole 2:00 and 4:00….It's confirmed that it's 4:00 A.M." (176:Ex.12:12). The interrogators said: "He came there early in the morning. I don't give a shit if it was midnight, 2:00 or 4:00 or 8:00 A.M. He comes there with bloody clothes. You're wakened up" (176:Ex.12:38;163:866-867).

Initially, Debra responded to the police pressure by saying that she did not remember, asking what they wanted her to do, and saying she did not understand (*See e.g.* 176:Ex.12:2-6,87,91). At certain points she became emotionally distraught and confused (*See e.g.* 176:Ex.12:71-73;163:878). She described herself as severely traumatized, numb, terrified, and confused (150:224). The interrogators admitted that she looked like a "deer in the headlights" (163:878-880). One of the interrogators responded to her lack of memory by saying:

> And if you don't remember it or you choose not to say it or whatever, that's whats gonna get you in trouble Debbie, plain and simple, that the thing that's gonna hang you.

(176:Ex.2:77).

Eventually, she said: "What do I need to remember?" (163:888). Four and a half hours into the interview, Debra responded to police pressure and confirmed that she saw blood on Forbes's shirt (176:Ex.12:156). She also confirmed that Forbes was agitated when he came in (176:Ex.12:71).

Police never told Debra she had the right to ask them to leave or to speak to an attorney (163:861-862). When she went to the bathroom at one point, an interrogator followed her and stood outside the door (150:225).

Later that day, Forbes was charged, based partially on the statements obtained from Debra's interrogation (33:3).

Two days later, Forbes called home from jail and spoke to Debra for the first time (51:3)(65:1-4)(163:944). The telephone conversation was recorded as per jail procedure (51:3). The conversation began with a discussion between Forbes and his son, James. Initially, Debra refused to talk to Forbes, because she first wanted to read the criminal complaint to "know what the hell they've got" on Forbes.

Eventually, however, Debra agreed to speak to Forbes, and asked him about the alleged blood that police had interrogated her about (159:46). The following exchange occurred:

> Debra: I have to find out what the facts are first.
>
> Curtis: The facts are Debra I did not murder Marilyn McIntyre.
>
> Debra: Then where'd the bloody shirt come from?

Curtis: I'll explain all that. I did not kill Marilyn.

Debra: Well explain it to me then.

Curtis: Not on the phone.

(159:46).

Motion to Suppress Debra's Statements

Before trial, the defense moved to suppress Debra's statements from the interrogation (20,21). The defense argued that police only had a warrant to collect Forbes's DNA, and that once Forbes was arrested and removed from the home, officers no longer had authority or consent to remain on the premises and interrogate Debra. The defense argued that Debra's statements were fruit of the illegal police conduct.

After a motion hearing which included extensive testimony, the circuit court agreed that police violated Forbes's 4th Amendment rights by remaining in his home without consent after he was arrested and removed from the home (33:11-12;App.B:11-12). Accordingly, the court ruled that all statements and evidence taken from Debra must be suppressed (33:12;App.B:12). Later, however, after various pleadings and on-the-record discussions, the court concluded that Debra's statements could be admitted to impeach her trial testimony (154:8;App.D:7;157:60;App.E:10).[4]

Motion to Present 3rd Party Perpetrator Evidence

Forbes's presented the defense that Lane McIntyre, not Forbes, committed the murder (*see, e.g.*, 166:112). Forbes asked for permission to present various evidence about

[4] These various proceedings are discussed in much more detail in the Argument section below.

Lane's pattern of domestic violence toward the victim and his subsequent wife (44:4)(58:1-4). The trial court prohibited Forbes from presenting, among other things, evidence that Lane struck the victim in front of family months before her death (58:2), and evidence that Lane assaulted his subsequent wife by grabbing her neck and sliding her up a garage wall (58:3).[5]

The Trial

The State's theory was that, on the night of the murder, Forbes was "on the prowl," flirting with and pursuing multiple women (165:1-7). The State called two women who encountered Forbes at bars that night, and said that he flirted with or propositioned them (one of these women was Lane McIntyre's sister, a lifelong friend of Forbes's)(160:66,111-112). The State theorized that, when he was unsuccessful with these women, he went to the victim's home at around 3:00 A.M., knowing that the victim's husband was gone working the night shift. The State posited that the victim opened the door and let Forbes in, but that she turned down his sexual advances, after which he brutally attacked her.

No witnesses saw Forbes at the victim's home that night. The State presented no physical evidence connecting Forbes to the crime in any way. Instead, the State relied heavily on the theory that Debra saw blood on Forbes when he arrived home that night, and that he was agitated. When she testified at trial, Debra said that she did not see any blood on Forbes when he returned home (162:720). However, the State then used her illegally obtained statement, in which she said she had seen blood on him (163:837). Testifying at trial, Debra said that she was nervous and in shock when she spoke to police (163:834-837). The defense argued that Debra's

[5] The victim in this case was strangled (160:18-19).

statement to police was the result of pressure, suggestion, and deception by police (166:104-111).

In opening and closing arguments, the State repeatedly emphasized Debra's statement about the blood (160:17-18,37,47;163:942;165:48,76-79,81,85,86,87,88). The State began its opening:

> Ladies and gentlemen of the jury, this is a case about following the blood. And when you follow the blood of Marilyn McIntyre, it leads to the defendant, Curtis Forbes.

(160:17-18). The State concluded its opening by saying:

> She says, "then where'd the bloody shirt come from," the same bloody shirt that she saw the defendant wearing with the blood at 4 AM. He says, "I'll explain all that," and repeats that he didn't kill Marilyn. Mrs. Forbes says, "Well, then explain it to me." And he tells her, "not on the phone."
>
> That, Ladies and Gentlemen, is an overview of the evidence that the state will introduce in order to show that Marilyn McIntyre's blood, when you follow it, it leads to the defendant, Curt Forbes.

(160:47).

The State repeated this strategy in closing, punctuating its lengthy argument by urging the jury: "Follow the blood, ladies and gentlemen. Follow the blood" (165:75). The State repeated: "The blood's on the sweater or the white shirt" (165:76). The State then played Debra's statement again for the jury (165:76), and then emphasized Forbes and Debra talking about it on the jail phone call (165:77).

Apart from Debra Forbes's statements, the State also relied on several witnesses who claimed Forbes made incriminating statements to them. The first was Gary Bednar, who had previously served time in prison for a murder, and who admitted he bore a grudge against Forbes (146:148-163). Bednar claimed that one day while visiting Forbes's house, Forbes told Bednar that he took a friend's wife home from a bar, killed her and got away with it (161:453). The defense pointed out that there was no evidence the victim in this case was at a bar the night of her murder; rather, she was at her home with her newborn child. Bednar claimed this confession took place in 2002, but he admitted that he did not tell police about it until 2009 (161:455).

Another witness, Shane Thompson, was in jail with Forbes while Forbes was awaiting trial. Thompson claimed that Forbes confessed to killing the victim so that she would not tell his girlfriend he was cheating on her (162:505). Thompson, however, admitted to signing a written statement for police in connection with this case in which he acknowledged, "I have a problem with lying" (162:517).

Finally, the State relied on testimony from two witnesses named Dean Sonnenberg and Mary Bailey (a woman who had an affair with Forbes years before (161:265)). Sonnenberg did not recognize Forbes and could not remember any confession (161:253). Bailey testified that, in 1982, Sonnenberg mentioned meeting a guy in a bar whose name he thought he remembered as "Curt," and that this "Curt" confessed to killing someone (161:265).

Apart from the Debra Forbes evidence and the evidence from Bednar, Thompson, and Bailey, the State also argued that Forbes had behaved suspiciously both at the time of the initial investigation and in 2009 when the investigation

was re-opened. The State argued that, even though Forbes came back to the area after initially leaving, he had grown a beard when he came back months later in a "savvy" and "very concerted effort" to "change his appearance" (165:94-95). The State also relied on the theory that Forbes, in 2009, purchased a rubber raft from Farm & Fleet because he was "planning his disappearance" (165:40,68). The State theorized that Forbes's plan was to "sink the boat and disappear" on Lake Michigan by "faking his death," and then meet up with Debra in Hawaii (165:68,69,70,73,74).

The defense argued that Forbes was innocent, that the State had little evidence, and that Lane McIntyre committed the murder (166:112). The defense argued that Debra Forbes's statements were the result of threats and intimidation by her interrogators, and that Bednar, Thompson, and Bailey were not credible.

The jury found Forbes guilty. The circuit court sentenced him to life in prison (168:66-69). Commenting on the evidence against Forbes after the trial, the circuit court stated, "It's a tough case. There's no question about that"(169:58).

ARGUMENT

I. The circuit court erred in admitting Debra Forbes's illegally obtained statements, as they were fruit of the poisonous tree and not sufficiently attenuated from the 4th Amendment violation.

Summary of Facts and Procedural History

The circuit court concluded that police illegally remained in Forbes's home without consent, and then interrogated his wife, Debra, in a threatening manner

(33:App.B). The circuit court held that this police activity violated Forbes's 4th Amendment rights (33:12:App.B:12).

As described above, that 4th Amendment violation began when approximately 10 officers met to serve a warrant on Forbes to collect DNA (33:1;149:38). They planned to arrest Forbes and then interrogate Debra (149:38). After arresting and removing Forbes, police remained in the home and interrogated Debra for approximately seven hours (164:1031). The interrogation was unquestionably aggressive and intimidating. Police repeatedly told Debra that Forbes was gone and never coming back, threatened to charge her with murder, and pressured her to confirm their version of events. Debra was emotionally distraught at times. When she got up to use the bathroom, police followed her and stood outside the door. Her incriminating statements came only after these aggressive tactics.

Initially, the circuit court concluded that police violated Forbes's 4th Amendment rights by remaining in his home after he was removed, and that Debra's statements were not attenuated from that 4th Amendment violation (33;App.B). The court noted that while Forbes allowed the officers in, he did not "give limitless permission for other officers to enter the home" (33:8;App.B:8). The court held that the additional officers who entered and subsequently interrogated Debra were not legally authorized to remain, because there was neither consent nor exigent circumstances (33:8;App.B:8).

The court further held that the subsequent interrogation was not attenuated from the illegal entry and "all statements and evidence" taken from Debra must be suppressed (33:10,12;App.B:10,12). The court noted that unlike ***Phillips***[6]

[6] ***State v. Phillips***, 218 Wis. 2d 180, 191, 577 N.W.2d 794 (1998). The cases referenced in this "Procedural History" are explained and discussed in more detail below.

(the case relied upon by the State), law enforcement treated Debra in a threatening way by telling her she was a suspect, implying that she had destroyed evidence, implying that she might be charged as party to a crime, and referencing the possibility of her "going away" and not being there for her family (33:10;App.B:10,11).

Subsequently, the court partially reversed itself and held that the State could use Debra's statement for impeachment purposes (154:8;App.D:7). The court reiterated that it had suppressed the evidence under the 4th Amendment; however, the court stated that it had not considered whether the statement was voluntary under ***Samuel***[7] or whether the statement could be used for impeachment purposes under ***James***[8] (152:147-9;App.C:10-12). The court found that, under ***Samuel's*** 5th Amendment analysis, Debra made her statements voluntarily, as the police had not acted "egregiously," even though their questioning of Debra was "at times threatening" (152:150;App.C:13;154:10-11;App.D:9-10). Next, the court reviewed ***James*** and reasoned that, in this situation, the truth-seeking function of the trial trumped the 4th Amendment violation and the statement could be admitted for impeachment purposes (154:11,13;App.D:10,12).

In subsequent comments at a later hearing, the court reiterated that Debra's statement was "voluntary," and that typically a voluntary statement can be used to impeach

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[7] ***State v. Samuel***, 2002 WI 34, ¶ 42, 252 Wis. 2d 26, 643 N.W.2d 423 (5th Amendment requires egregious police misconduct to suppress witness statements based on coecion). *See* discussion *infra* Section I(A)(1).

[8] ***James v. Illinois***, 493 U.S. 307, 320 (1990)(deterrent purposes of the exclusionary rule trump other interests when the issue is impeachment of a witness other than the defendant). *See* discussion *infra* Section I(C).

(157:52;App.E:1). Applying ***Ceccolini***,[9] the court stated that Debra gave the statements of her own "free will," out of a "desire to be cooperative with law enforcement" (157:58,59;App.E:8,9). Based on all this, the court stated that the statement was "attenuated from the illegal entry" (157:60;App.E:9). The court also found that, even if the officers had not obtained the statement on the day of the illegal entry, they had a "very significant" likelihood of legally doing so at a later date (157:58,60;App.E:7,9).

Summary of Legal Standards

The exclusionary rule prevents the State from introducing evidence if the State obtained the evidence through a 4th Amendment violation, in other words, if the evidence is "fruit of the poisonous tree." ***Wong Sun v. United States***, 371 U.S. 471, 486 (1963); ***Brown v. Illinois***, 422 U.S. 590, 599 (1975); ***United States v. Ienco***, 182 F.3d 517, 526 (7th Cir. 1999). Physical entry of the home is the chief evil against which the 4th Amendment is directed. ***State v. Phillips***, 218 Wis. 2d 180, 195-196, 577 N.W.2d 794 (1998). Courts apply the exclusionary rule to physical, tangible evidence, as well as verbal evidence. ***Wong Sun***, 371 U.S. at 485 ("[V]erbal evidence which derives so immediately from an unlawful entry and an unauthorized arrest…is no less the 'fruit' of official illegality than the more common tangible fruits of the unwarranted intrusion"). The rule serves a preventative purpose by removing incentives for the State to disregard constitutional rights. ***Brown***, 422 U.S. at 599-600.

The attenuation doctrine outlines criteria for determining whether evidence is fruit of the poisonous tree. ***Brown***, 422 U.S. at 603; ***State v. Simmons***, 220 Wis. 2d 775,

[9] ***United States v. Ceccolini***, 435 U.S. 268, 276 (1978)(live-witness suppression standard based on 4th Amendment violation). *See* discussion *infra* Section I(A)(1).

780, 585 N.W.2d 165 (Ct. App. 1998). Under this doctrine, circuit courts determine whether, assuming establishment of a prior illegality, the evidence came about from "the exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." ***Wong Sun***, 371 U.S. at 488.

It is the State's burden to prove attenuation—that the illegal conduct did not taint the evidence. ***Brown***, 422 U.S. at 603-04, ***Phillips***, 218 Wis. 2d at 204-05; ***Ienco***, 182 F.3d at 528. In general, to determine whether the State fulfills this burden, circuit courts consider:

> (1) the time elapsed between the illegality and the acquisition of the evidence;
>
> (2) the presence of intervening circumstances; and
>
> (3) the purpose and flagrancy of the official misconduct.

See ***State v. Walker,*** 154 Wis. 2d 158, 186-87, 453 N.W.2d 127 (1990)(***Brown*** analysis proper test for attenuation).

When the evidence in question is a witness's statement or testimony, courts first consider the threshold question of whether the statement was entirely an act of "free will," uninfluenced by the 4th Amendment violation. ***Brown***, 422 U.S. at 604. The State bears the burden of proving the statement or testimony was freely given and untainted by the illegality. ***Id.***

This question of "free will" stems from ***Wong Sun***, which mandates that it is not enough for the statements to merely meet the 5th Amendment voluntariness standard. 371

U.S. at 486.[10] Rather, to satisfy 4th Amendment attenuation standards, the statements must be "sufficiently an act of free will to purge the primary taint." ***Id.*** Thus, the State must show that the statements meet the 5th Amendment standard for voluntariness, but also that they meet the separate "free will" standard for 4th Amendment attenuation. ***Brown***, 422 U.S. at 603-04. A particular statement might satisfy 5th Amendment voluntariness standards, but still fail to satisfy the 4th Amendment "free will" standard. *See* ***United States v. Akridge***, 346 F.3d 618, 635 (6th Cir. 2003)(Moore, J. dissenting)("Ellison and Stewart's decision to plea bargain was 'voluntary' in the sense that they did choose to plea bargain over their other alternatives. But that does not make their decision 'voluntary' within the meaning of ***Ceccolini***, under which we must differentiate between witnesses who testified of their own volition and those that testified because of inducement or coercion on the part of the government").

To determine whether a witness made a statement with "free will," a court must inquire whether the witness would have done so of her own volition, uninfluenced by the State's initial illegality. ***Ienco***, 182 F.3d at 530; ***United States v. Ramirez-Sandoval***, 872 F.2d 1392, 1397 (9th Cir. 1989). A court must consider "the time, place and manner of the initial questioning of the witness" in order to determine whether "statements are truly the product of detached reflection and a desire to be cooperative on the part of the witness." ***Ceccolini***, 435 U.S. at 277**.** In ***Ceccolini***, the United States Supreme Court identified the following factors for making this determination:

[10] The remainder of this section uses the term "free will," rather than "voluntariness," to distinguish 4th Amendment from 5th Amendment analysis.

> (1) whether the testimony given by the witness was an act of free will or coercion or induced by official authority as a result of the initial illegality;
>
> (2) whether the illegality was used in questioning the witness;
>
> (3) how much time passed between the illegality and contact with the witness and between the contact and the testimony;
>
> (4) whether the identity of the witness was known to the police before the illegal conduct; and
>
> (5) whether the illegality was made with the intention of finding a witness to testify against the defendant.

Ienco, 182 F.3d at 529-30 (citing ***Ceccolini***, 435 U.S. at 276 (1978)). When it "appears that the witness has been pressured and that the pressure is a consequence of the prior Fourth Amendment violation…a finding of attenuation is unlikely to be justified." Wayne R. LaFave, 5 *Search and Seizure: A Treatise on the 4th Amendment* § 11.4 (3d ed. 1996).

Failure to meet this "free will" standard results in suppression, without further need to apply the ***Brown*** factors. ***State v. Reiman***, 2006 WI App 56, ¶ 9, 290 Wis. 2d 512, 712 N.W.2d 87 ("[T]he State failed to meet its burden of proof [as to ***Ienco/Ceccolini***]. Accordingly, we do not reach the attenuation doctrine's application to the facts any further than the required threshold of a statement's voluntariness").

A. The State failed to prove that Debra's statements were the product of "free will" and sufficiently attenuated from the police's illegal entry.

Debra's statements were a direct and immediate result of the ongoing illegal police presence in the Forbes's home. The circuit court concluded that, after Forbes was taken out of the home, police had no lawful right to remain and question Debra. Rather than leave once the purpose of their warrant had been accomplished, police instead remained and engaged in a lengthy, aggressive interrogation. This interrogation cannot be separated from the ongoing 4th Amendment violation. Debra's statements thus do not demonstrate the "free will" required under ***Ceccolini***, or meet the attenuation standard under ***Brown***.

There are three aspects to the attenuation analysis here, as set forth below. First, under ***Ceccolini***, the State cannot satisfy the threshold "free will" standard, because the State cannot prove that Debra's statements were uninfluenced by the illegality. Further, ***Samuel*** is irrelevant to this case because it addresses 5th Amendment "voluntariness," not exclusions based on 4th Amendment violations. Second, even if the State could establish the requisite "free will," the State still cannot satisfy the ***Brown*** factors. Finally, the State failed to prove that Debra's statements fall under the inevitable discovery exception.

1. The State failed to prove that Debra's statements were the product of "free will," uninfluenced by the police's 4th Amendment violation.

Contrary to the court's ruling, it was simply not possible for Debra to make her statement out of her own free will—uninfluenced by the illegality—as she made it in the

midst of an ongoing 4th Amendment violation. Under ***Ceccolini***, the State failed to establish that the statements were free from inducement.[11]

First, because Debra's statements were inexorably linked to the police illegality, the State failed to prove that she made her statements with "free will." Debra made an incriminating statement only after police illegally remained in her home, interrogated her for hours, insinuated they had incriminating physical evidence to use against Forbes, and made threats to charge and prosecute her with the homicide. The circumstances surrounding the statements strongly suggest that she was not speaking of her own free will, but rather was strongly influenced by the precarious position created by the police. *See* ***Ienco***, 182 F.3d at 530 (witness statements inadmissible as they were "so inexorably linked" to illegal arrest and search); ***United States v. Rubalcava-Montoya***, 597 F.2d 140, 144 (9th Cir. 1978)(witness testimony gained from illegal car search for aliens suppressed as "the testimony of the witnesses [was] so closely, almost inexorably, linked" to illegal search); ***United States v. Padilla***, 960 F.2d 854, 863 (9th Cir. 1992)(defendant could not testify of own free will after illegal search revealed incriminating evidence); ***United States v. Hernandez***, 670 F.3d 616, 624 (5th Cir. 2012)(discovery of incriminating evidence during illegal search "vitiated any incentive…to avoid self incrimination"); ***United States v. Karathanos***, 531

[11] It is worth noting that ***Ceccolini*** considered the complete suppression of a live witness's testimony, not merely the suppression of a prior statement. ***Ceccolini***, 435 U.S. at 277. In general, the suppression of prior witness statements receives less scrutiny than the complete suppression of live-witness testimony. ***Id.*** at 278. This brief applies the ***Ceccolini*** standards to Debra's prior statements, as it is the most appropriate test to determine admissibility. However, many of the concerns described in ***Ceccolini*** are not present in this case, because Debra was willing to testify at trial, and did, with no objection from the defense.

F.2d 26, 35 (2d Cir. 1976)(no free will after prosecutors promised not to prosecute witnesses after illegal search).

Second, the State failed to prove that police did not "use the illegality in questioning the witness." ***Ienco***, 182 F.3d at 529-30 (citing ***Ceccolini***, 435 U.S. at 276). By definition, the police "used" their illegality in obtaining Debra's statement, because they interrogated her in the course of illegally remaining in the home. *See* ***State v. Halverson***, 2011 WI App 143, ¶ ¶ 14-15, 337 Wis. 2d 558, 806 N.W.2d 269 (witness statements collected by officer while illegally seizing and detaining defendant in squad car for 30 to 45 minutes were the result of exploitation).

Third, as to "how much time passed between the illegality and contact with the witness," there is simply no passage of time at all. ***Ienco***, 182 F.3d at 529-30 (citing ***Ceccolini***, 435 U.S. at 276). The police illegally remained in the home, and Debra made her statements simultaneously during that illegality. The seven hours that passed during the interrogation are not the kind of "passage of time" envisioned by the attenuation standard. Questioning a witness as the result of illegal police conduct does not sever the connection between the witness statements and the illegality. ***Brown***, 422 U.S. at 602-05 (passage of time spent questioning defendant after illegal arrest did not sever connection between confession and illegality); ***Dunaway v. New York***, 442 U.S. 200, 218-19 (1979)(same); ***Ienco***, 182 F.3d at 531 (co-defendant statements made eleven hours after illegal arrest and seven hours after illegal search not separated by substantial time).

Fourth, although the police did know of Debra before their illegal entry, that factor is insignificant to this analysis. The underlying idea of this factor in ***Ienco/Ceccolini*** is whether police would have inevitably discovered the

information without the illegality.[12] ***Ienco***, 182 F.3d at 531. There clearly would be no "inevitable discovery" if police did not know the identity of a witness who was discovered pursuant to the illegality. But, here, there is still no "inevitable discovery" as the State presented no evidence that police could have obtained Debra's statements without exploiting the illegality. All the evidence suggests the contrary. Immediately after her recorded interrogation, police returned to Debra in an attempt to have her review the transcript of the interrogation (176:Ex.67:1). She twice refused to answer the door, even though she was home (176:Ex.67:1). She also ignored a phone call and voicemail from police (176:Ex.67:1). She then retained an attorney and directed the attorney to tell police to stop contacting her (176:Ex.67:1-2). When she testified at trial, she said the opposite of what she had said during the interrogation—she testified that she did not see any blood on Forbes when he returned home (162:720).[13] There is no indication that she would have given the same statement at any other time if not for the police illegality.

Finally, the State failed to show that the police remained in the house with no intent to interrogate Debra and collect incriminating information against Forbes. ***Ienco***, 182 F.3d at 529-30 (citing ***Ceccolini***, 435 U.S. at 276). In fact, police testimony showed the opposite—that even before going to Forbes's house, police planned to remove Forbes and interrogate his wife (149:38). The police left the residence only after they had interrogated Debra and obtained incriminating information from her.

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[12] The separate question of attenuation by "inevitable discovery" is addressed below in section I(A)(3).

[13] Moreover, even if this factor cuts somewhat against Forbes, one factor alone "cannot tilt the balance in favor of the State's position in light of the rest of the Ceccolini factors which support suppression." ***Ienco***, 182 F.3d at 531.

Considering all of these factors, the court incorrectly ruled under ***Ceccolini*** that Debra's statement was the product of her own "free will." In so doing, the court not only failed to properly analyze the factors, but the court also failed to apply the proper burden of proof. There is no indication in the court's ruling that it understood it was the State's burden to establish the ***Ienco/Ceccolini*** factors (157:53,58,59;App.E:2,8,9).

The court's analysis rested in part on a misunderstanding of ***Ceccolini's*** "free will" standard. The court improperly based its finding on a 5th Amendment voluntariness standard, pursuant to ***Samuel*** (154:10-11;App.D:9-10). That 5th Amendment standard—which is much easier for the State to meet as it requires "egregious" police conduct—is irrelevant to this analysis and only confuses the "free will" analysis required by the 4th Amendment. ***Samuel***, 2002 WI at ¶ 42 (2002)(concluding that when a defendant seeks to suppress witness statements as the product of coercion, the police misconduct must be egregious). The issue here is whether the State has proved "free will" for 4th Amendment purposes, not voluntariness for 5th Amendment purposes. *See* ***Wong Sun***, 371 U.S. at 486; ***Brown***, 422 U.S. at 599. While there is evidence of coercive behavior on the police's part in this case, the broader analysis required by ***Ceccolini*** is whether Debra's free will was influenced even in part by the police's illegal presence in her home. ***Ramirez-Sandoval***, 872 F.2d at 1397; ***Ienco***, 182 F.3d at 530. As the issue here is strictly one concerning 4th Amendment attenuation, ***Samuel*** does not apply.

2. Even if this Court concludes that Debra's statements were made with "free will" under Ceccolini, the State still failed to prove sufficient attenuation from the initial taint of the police's 4th Amendment violation under *Brown*.

If this Court concludes—contrary to the arguments in the previous section—that the State met its burden as to the threshold issue of "free will" under ***Ceccolini***, this Court must also assess if the State demonstrated attenuation under ***Brown***. 422 U.S. at 604. Considering the facts of the case, Debra's statements were not sufficiently attenuated to remove them from the protection of the exclusionary rule. An application of the ***Brown*** factors shows that the State failed to carry its burden of proof to establish attenuation.

First, the State failed to show that a sufficient amount of time elapsed between the police's illegal presence and Debra's statements since the two were virtually simultaneous. A court must consider both the amount of time between the police misconduct and the conditions that existed during that time. ***State v. Kiekhefer***, 212 Wis. 2d 460, 481, 569 N.W.2d 316 (Ct. App. 1997); ***Phillips***, 218 Wis. 2d at 206. As to the amount of time, Debra made her statements to the police while they were illegally present in her home. There was no lag time between the police's violation and Debra's interview. *See* ***Taylor v. Alabama,*** 457 U.S. 687, 691 (1982)(confession that followed illegal arrest by six hours not sufficiently attenuated to purge the taint of the illegal arrest where defendant was in custody the entire time). As to the conditions, the lengthy and aggressive interrogation does nothing to dissipate the illegality; rather, it exacerbates it. *See* ***State v. Farias-Mendoza***, 2006 WI App 134, ¶ 31, 294 Wis. 2d 726, 720 N.W.2d 489 (police requesting DNA sample

from defendant after five hours of isolation exploited elapsed time, rather than dispelled the taint of the illegal seizure).

Second, considering the lack of time between the police's illegal presence in the Forbes's home and Debra's statements, the State failed to show any intervening circumstances. As stated above, questioning and interrogation are not intervening circumstances and do not lead to attenuation on their own. *See* ***Brown***, 422 U.S. at 602-05; ***Dunaway***, 442 U.S. at 218-19; *see also* ***United States v. Robeles-Ortega***, 348 F.3d 679, 683-84 (7th Cir. 2003)(conversation leading to signing a written consent form "is distinct from the types of circumstances that previously have been considered sufficient"). In fact, questioning and interrogation are aggravating, not intervening, circumstances. *See* ***State v. Bermudez***, 221 Wis. 2d 338, 355, 585 N.W.2d 628 (1998)(officers' conveying information to defendant's wife after illegal entry made it more likely intervening circumstances exploited illegality rather than vitiated it). Debra made her statements immediately during the police's illegal presence in her home while they continuously questioned her for nearly seven hours.

Finally, the State failed to establish that the purpose and flagrancy of the police conduct suggested attenuation. As indicated previously, police planned to use the DNA warrant as a means to interrogate Debra, demonstrating that the illegality had an "investigatory" purpose. ***Brown***, 422 U.S. at 605 ("the two detectives…repeatedly acknowledged…that the purpose of their action was 'for investigation' or for 'questioning'…The arrest, both in design and in execution, was investigatory"); *see also* ***Bermudez***, 221 Wis. 2d at 356 (police officers interrogating defendant's wife was "an orchestrated attempt to collect further incriminating evidence").

Further, the circuit court found that the circumstances of the interrogation were at least somewhat threatening (33:10;App.B:10,11). Such aggressive interrogation techniques establish a level of flagrancy and intent to intimidate. ***Brown***, 422 U.S. at 605 (police conduct found to be flagrant because it was "calculated to cause surprise, fright and confusion"); *See* ***United States v. Green,*** 111 F.3d 515, 523 (7th Cir. 1997) (presence of flagrancy and official misconduct can tip the balance away from attenuation).

B. The State failed to prove that the statements were attenuated under the inevitable discovery doctrine.

The circuit court concluded that even if the officers had failed to take Debra's statement on the day of the illegal entry, they would have returned to the house at a later time with a "very significant" likelihood of legally obtaining the same incriminating information (157:58,60;App.E:7,9).

To satisfy the inevitable discovery exception to suppression, the State must prove by a preponderance of the evidence that "the evidence would have been discovered by lawful means." ***Nix v. Williams***, 467 U.S. 431, 444 (1984); ***State v. Schwegler***, 170 Wis. 2d 487, 499-500, 490 N.W.2d 292 (Ct. App. 1992). To do so, the State must demonstrate all of the following:

> (1) a reasonable probability that the evidence in question would have been discovered by lawful means but for the police misconduct;
>
> (2) that the leads making the discovery inevitable were possessed by the State at the time of the misconduct; and

(3) that prior to the unlawful search of the State also was actively pursuing some alternate line of investigation.

State v. Schwegler, 170 Wis. 2d at 500 (citing ***United States v. Cherry***, 759 F.2d 1196, 1204 (5th Cir. 1985), cert. denied, 479 U.S. 1056) (1987)).

Here, the State cannot satisfy its burden as to the first prong, because no evidence suggests that Debra would have made similar such incriminating statements outside of the illegal police presence in her home. As stated above, immediately after her recorded interrogation, police returned to Debra in an attempt to have her review the transcript of the interrogation (176:Ex.67:1). She twice refused to answer the door, even though she was home (176:Ex.67:1). She also ignored a phone call and voicemail from police (176:Ex.67:1). She then retained an attorney and directed the attorney to tell police to stop contacting her (176:Ex.67:1-2). When she testified at trial, she said the opposite of what she had said during the interrogation—she testified that she did not see any blood on Forbes when he returned home (162:720). There is no indication that she would have given the same statement at any other time if not for the police illegality

C. The circuit court incorrectly concluded—contrary to the U.S. Supreme Court's decision in *James*—that Debra's statements could be admitted for impeachment because the truth-seeking function of the trial outweighed 4th Amendment interests.

The circuit court initially excluded Debra's statements altogether, but later admitted them for impeachment. The circuit court reasoned that the truth-seeking function of the trial trumped the deterrent purposes of the exclusionary rule,

and, thus, Debra's statement could be admitted for impeachment purposes (154:11,13;App.D:10,12).

The circuit court's ruling was legally incorrect and foreclosed by binding precedent. Under the U.S. Supreme Court's decision in ***James v. Illinois***, 493 U.S. 307 (1990), information obtained in violation of the 4th Amendment may not be used to impeach any witness other than the defendant himself. ***James*** forecloses the balancing test engaged in by the circuit court. ***James*** holds, contrary to the circuit court's claim, that the deterrent purposes of the exclusionary rule trump other interests when the issue is impeachment of a witness other than the defendant.

As this Court is well aware, evidence obtained in violation of a defendant's 4th Amendment rights generally must be suppressed at trial. ***Harris v. New York***, 401 U.S. 222, 225-26 (1971). In ***Harris***, the Supreme Court created an exception to this general rule, allowing a defendant who testifies to be impeached with evidence obtained in violation of his 4th Amendment rights. ***Id***. *at* 225-26.

In ***James***, the Supreme Court refused to extend that exception to other defense witnesses. 493 U.S. 307 (1990). The defendant in ***James*** successfully moved for suppression of his statements because they were obtained after a warrantless arrest that lacked probable cause, in violation of the Fourth Amendment. ***Id***. at 309-10. At trial, the State sought to use those illegally obtained statements to impeach a defense witness whose testimony was inconsistent with those statements. ***Id***. at 310. The trial court noted that the statements were voluntary and therefore determined that the State could use them to impeach the witness. ***Id***. The Supreme Court disagreed, holding that the ***Harris*** impeachment exception does not apply to witnesses other than the defendant. ***Id.***

The Court began by explicitly acknowledging, as did the circuit court here, the truth-seeking function of trials. ***Id.*** at 311 ("There is no gainsaying that arriving at the truth is a fundamental goal of our legal system"). But the Court then went on to explain why that interest is trumped by 4th Amendment interests when the issue is impeachment of a witness other than the defendant. The Court made clear that the purpose of the ***Harris*** exception is not served when the person being impeached is a witness, as opposed to the defendant. ***Id***. at 313-14 ("Expanding the class of impeachable witnesses…would not promote the truth seeking function to the same extent as did creation of the original exception and yet would significantly undermine the deterrent effect of the general exclusionary rule").

The Court further elaborated on this difference, noting that the benefits of the ***Harris*** exception for defendants' testimony do not apply with equal force to witnesses. ***Id***. at 314. Defendants, who are already facing prison time, are less likely than typical witnesses to be deterred by the possibility of perjury charges. ***Id***.

The Court held that expanding the ***Harris*** exception would undermine the deterrent purpose of the exclusionary rule. Expanding the class of impeachable witnesses beyond the defendant would "significantly enhance the expected value to the prosecution of illegally obtained evidence," because it would "vastly increase the number of occasions on which such evidence could be used." ***Id.*** at 318. Witnesses in general greatly outnumber defendants. The Court thus believed: "police officers and their superiors would recognize that obtaining evidence through illegal means stacks the deck heavily in the prosecution's favor." ***Id.***

The rationale of ***James*** is even more compelling when the witness is called by the State. The 4th Amendment exclusionary rule would have little force if the State could circumvent it merely by calling the witness in its case-in-chief and impeaching her. As the Federal District Court for the Western District of Wisconsin held in addressing the same issue: "Allowing the State to use the illegal statement during the presentation of its case—even if used to impeach its own witness—would virtually negate the exclusionary rule altogether." ***Kuntz v. McCaughtry***, 806 F. Supp. 1373, 1380 (1992). The court noted that, "the State would have free reign to present witnesses just for their impeachment value in order to get the illegal statement before the jury." ***Id***.

Indeed, the Government implicitly conceded in ***James*** that the ***Harris*** impeachment exception would not apply to witnesses called in the State's case-in-chief. ***Id.*** at 318. The Government in ***James*** defended its attempt to expand ***Harris*** to defense witnesses by asserting that the rule would still apply to prosecution witnesses. ***Id.*** ("The United States argues that this result is constitutionally acceptable because excluding illegally obtained evidence solely from the prosecution's case in chief would still provide a quantum of deterrence sufficient to protect the privacy interests underlying the exclusionary rule").

Thus, the circuit court's ruling—that the truth-seeking function of a trial outweighed 4th Amendment interests—is foreclosed by ***James***.

II. The exclusion of evidence concerning Lane McIntyre violated Forbes's right to present a defense.

Forbes's main defense was that Lane McIntyre, not Forbes, committed the murder (*See, e.g.,* 166:112).

Lane was an obvious suspect.[14] He lived with the victim, discovered her body, and was the last person to see her alive. There were no signs of forced entry, and the knife used to stab the victim came from the McIntyre residence (163:1006;164:1230). On the weekend prior to the victim's death, witnesses saw Lane strike the victim in the face, knocking her to the ground (152:7-14). As she crawled away, Lane kicked her from behind in the vagina (152:7-14). Lane took out a life insurance policy on the victim three days before her death (164:1213-1214).

Further, Lane had ample opportunity to commit the crime, even though he claimed he was at work when the victim died. On the night before the victim was found dead, neighbors heard a loud argument between the McIntyres, and specifically recognized Lane's voice (161:322-323,341-342,349). The medical examiner's conclusion about the time of death made it entirely possible that the victim died the night of the argument, before Lane went to work the next day (146:34). Though Lane has always maintained that his wife must have been killed early in the morning of March 11 after he went to work for the late shift that night, he put March 10 as the date of death on her headstone (160:438-439;164:1240-1243). And, tellingly, it was Lane who initially cast suspicion on Curtis Forbes (164:1225).

[14] This is so even without knowing Lane's history as a domestic abuser. Thirty to fifty percent of female homicide victims were killed by intimate partners, either current or former. Wisconsin Prosecutor's Domestic Abuse Reference Book, p. 15-10 (2012); available at: http://oja.wi.gov/docview.asp?docid=23308&locid=97 (citing CAROLINE WOLF HARLOW, FEMALE VICTIMS AND VIOLENT CRIME REPORT 5 (1991)).

Despite the fact that Lane was the obvious suspect, the circuit court prohibited Forbes from presenting evidence of Lane's pattern of domestic violence toward the victim, and toward the woman Lane married after the victim's death. The circuit court prohibited Forbes from presenting the following:

- Witness testimony that at the family Christmas party the December prior to the victim's murder, Lane became angry with the victim and struck her in the presence of family (58:2).

- Witness testimony that on an occasion prior to their marriage, Lane and the victim had a fight in the street outside a bar. After the fight Lane punched a hole through a wall (58:1).

- Lane's statements during an interview with law enforcement where he described assaulting his second wife. He said that he "reached over the car window. I grabbed her by her neck and slid her up the garage wall. Her feet weren't touching the ground" (58:3).

- During the same interview, Lane described his role in a marriage as "I'm the man of the house. Nobody's taking that away from me" (58:3).

The circuit court recognized that this ***Denny/Sullivan*** issue was "very important" (152:5), and the court acknowledged that the burden on the defense in such situations is less than it would be on the State (152:20;App.F:2). Nonetheless, the court excluded the above evidence (152:19;App.F:1). The circuit court warned that "[t]his is not going to become a trial that is going to put Mr. McIntyre on trial for this crime" (152:21-22). The court excluded the Christmas incident stating "it's too remote in time to be relevant here. There are lot of people that have

problems in public and private" (160:22). The court excluded the bar fight incident as "too far afield" and as "character type of evidence" (160:22-23). The circuit court also excluded the interview in which Lane McIntyre described a strangulation and savage attack on his second wife (160:24). The court found this episode to be "irrelevant to the crime here." (160:25). The court also excluded Lane's statements in that interview concerning his lack of respect for women as being "character evidence." (160:25).

Excluding the above evidence violated Forbes's Constitutional right to present a defense. The evidence would have established a pattern of domestic control and physical violence. And it would have shown that the pattern established in Lane's other acts mirrored the facts of the murder, in two significant ways. First, on the night of the murder, Lane and the victim had a loud argument in their apartment; on a prior occasion, this same kind of argument ended in Lane striking the victim. Similarly, during Lane's second marriage, he became angry with his wife and grabbed her by the neck, lifting her off the ground. The victim in this case died in part from strangulation. The other acts evidence would have been very important to Forbes's defense that Lane committed the murder.

Legal Standards

This Court applies a *de novo* standard of review to this issue:

> Generally, the admissibility of evidence is determined by the trial judge subject to the limits of relevancy and adequacy of proof, and we afford the trial court broad discretion as long as the evidence tends to prove a material fact. However, "when the focus of a circuit court's ruling is on a defendant's asserted due

> process right to introduce evidence, the issue is more properly characterized as one of constitutional fact, and is, therefore, subject to de novo review."

State v. Avery, 2011 WI App 124, ¶41, 337 Wis. 2d 351, 804 N.W.2d 216 (internal citations omitted)(citing ***State v. Knapp***, 2003 WI 121, ¶173, 265 Wis. 2d 278, 666 N.W.2d 881, *vacated and remanded*, 542 U.S. 952, *reinstated in material part*, 2005 WI 127, ¶2 n.3, 285 Wis. 2d 86, 700 N.W.2d 899).

Under the Confrontation and Compulsory Process Clauses of the State and Federal Constitutions, a criminal defendant has a Due Process right "to a fair opportunity to defend against the State's accusations." ***State v. Evans***, 187 Wis. 2d 66, 82-3, 522 N.W.2d 554 (Ct.App.1994). The right to present evidence is rooted in these provisions. ***Id.***

Third-party perpetrator evidence is admissible if there is a "legitimate tendency" that the third party could have committed the crime. ***State v. Denny***, 120 Wis. 2d 614, 623, 357 N.W.2d 12 (Ct. App. 1984). "To show 'legitimate tendency,' a defendant should not be required to establish the guilt of third persons with that degree of certainty requisite to sustain a conviction in order for this type of evidence to be admitted." ***Id.*** at 623. Rather, the legitimate tendency test requires the defendant to show three things: 1) motive, 2) opportunity, and 3) some evidence to directly connect the third party to the crime charged which is not remote in time, place or circumstance. ***State v. Scheidell***, 227 Wis. 2d 285, 296, 595 N.W.2d 661 (1999). "The 'legitimate tendency' test asks whether the proffered evidence is so remote in time, place or circumstances that a direct connection cannot be made between the third person and the crime." ***Denny***, 120 Wis. 2d at 624.

When third-party perpetrator evidence includes a third party's "other acts," the ***Sullivan*** standard applies. ***State v. Scheidell***, 227 Wis. 2d 285, 294-95, 300, 595 N.W.2d 661 (1999). *See also* ***Sullivan***, 216 Wis. 2d 768, 576 N.W.2d 30. The ***Sullivan*** analysis turns on 1) whether the other-acts evidence is offered for a permissible purpose; 2) whether the other-acts evidence is relevant; and 3) whether the probative value of the other-acts evidence is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, or by consideration of undue delay, waste of time, or needless presentation of cumulative evidence. ***Sullivan***, 216 Wis. 2d at 772.

A. Evidence of Lane McIntyre's pattern of domestic violence satisfies the *Denny* factors.

Lane's previous fights and physical altercations with the victim, his rather vicious domestic violence against his second wife, and his domineering and patriarchal world view all make it more likely that he may have murdered his wife. These sources of evidence establish a pattern and context of violent, controlling domestic behavior. Such evidence plainly would have added significantly to the possibility that Lane, not Forbes, committed the murder. The evidence satisfies the ***Denny*** factors.

First, Lane had motive, opportunity, and a direct connection to the crime. As to motive, Lane purchased life insurance on the victim three days before her murder (164:1213-1214). His pattern as a serial domestic abuser also demonstrates a motive to control and dominate his wife, a pattern and motive that can lead to murder.

As to opportunity and direct connection, Lane was the last person to see his wife alive and the first to report her murdered (164:1185-1189). He was heard having a loud

argument with her in his apartment on the night of the murder (161:322-323; 341-342). Though he claimed he was at work when she died, the medical examiner's testimony left ample room for the theory that Lane killed his wife before he went to work. He thus had opportunity and a direct connection to the crime. ***Denny***, 120 Wis. 2d at 624 ("[W]here it is shown that a third person not only had the motive and opportunity to commit the crime but also was placed in such proximity to the crime as to show he may have been the guilty party, the [third-party] evidence would be admissible").

B. The evidence also satisfies *Sullivan*.

Precedent suggests that, under ***Sullivan***, evidence of previous domestic violence is often admissible to establish a charged act of domestic violence. This is because the previous domestic violence proves the defendant's motive, intent, plan, and preparation (among other things) in the charged crime. *See* ***State v. Clark***, 179 Wis. 2d 484, 494-497, 507 N.W.2d 172 (Ct. App. 1993)(admitting evidence that the defendant had battered a previous girlfriend three years prior in order to prove domestic violence as to the crime charged). Similar evidence has been admitted to establish "the context of the crime" and "a complete explanation of the case"—specifically a climate of power and control between an abuser and his victim. ***State v. Hunt***, 2003 WI 81, ¶58, 263 Wis. 2d 1, 35, 666 N.W.2d 771 (admitting other acts of assault by defendant to provide "an understanding of the abuse that took place in the home, and the authority and control Hunt possessed").

The same analysis applies here. Evidence of Lane's other acts of domestic violence—against the victim and against his subsequent wife—are probative of Lane's intent, motive, plan, and preparation in this case, and to the overall context of his relationship with the victim. The evidence is

also probative to Lane's "identity" as the killer. Evidence that Lane fought with and hit the victim prior to her death has probative value as to whether he harmed her on the night of her death. His subsequent violence against his second wife, and his attitude about his patriarchal role, have similar probative value as to what may have occurred the night of the victim's death. These other acts thus have probative value as to permissible purposes.

It is worth noting that the similarities between the other acts and the victim's murder weigh significantly in favor of admissibility. ***Clark***, at 494 (similarities between prior act and charged act "are significant and render the prior-act evidence highly probative"). The two prior acts involving the victim are an argument outside a bar after which Lane punched a whole in a wall and an incident in which Lane struck the victim at a holiday party. Both parallel the circumstances surrounding the murder. On the night before the victim died, Lane and the victim had a loud argument in their apartment. It is reasonable to infer from this that, as he had in the past, Lane reacted to this argument with a physical outburst that included striking the victim. The other act as to Lane's second wife also bears a chilling similarity to the murder. In that act, Lane grabbed the victim by her neck and lifted her off the ground. The victim in this case was strangled by her attacker (146:12;164:1230). The similarities between the other acts and the murder increase the probative value of the other acts.

Finally, the probative value of this evidence is not substantially outweighed by the danger of unfair prejudice. The probative value, as explained above, is significant because the evidence establishes a pattern of violence and control that makes murder substantially more likely. Moreover, the prejudicial effect—especially with a jury instruction—is slight. ***Hunt***, 2003 WI 81, ¶72-73 ("[T]he

circuit court offered proper cautionary instructions on the other-acts evidence. Accordingly, any unfair prejudicial effect caused by the admittance of the other-acts evidence was substantially mitigated by the circuit court's cautionary instructions"). There is little danger that the jury would have drawn any unfair conclusions from the other acts evidence; rather, the jury likely would have drawn the entirely fair conclusion that Lane's pattern of domestic abuse and control made it significantly more likely that he may have murdered the victim.

The trial court's reasons for excluding the evidence are not convincing. The trial court stated, "[t]his is not going to become a trial that is going to put Mr. McIntyre on trial for this crime" (160:21-22). But, at least to some extent, ***Denny*** evidence necessarily does just that: it allows the defense to create reasonable doubt by producing evidence against someone else. The mere fact that ***Denny*** evidence to some extent "puts a third party on trial" does not provide a basis for excluding it.

The court also stated that the prior acts of violence against the victim were "too remote in time to be relevant here" (160:22). But cases allow much older prior acts evidence. ***Clark***, 179 Wis. 2d at 495 ("[w]hen compared to other prior-act cases, three years is a relatively short period of time"); ***State v. Plymesser***, 172 Wis. 2d 583, 596, 493 N.W.2d 367 (1992)(thirteen years between prior act and crime charged); ***State v. Kuntz***, 160 Wis. 2d 722, 747-48, 467 N.W.2d 531 (1991) (sixteen years); ***State v. Mink***, 146 Wis. 2d 1, 16, 429 N.W.2d 99 (Ct. App. 1988) (twenty-two years); ***State v. Evans***, 2011 WI App 75, ¶14, 334 Wis. 2d 146, 799 N.W.2d 929 (twenty-five years).

The court also suggested that the prior acts of violence were "too far afield" and not probative because "[t[here are a

lot of people that have problems in public and private" (160:22). However, as stated above, the prior acts are not "far afield" because they are similar to what occurred on the night of the murder. In the prior acts, Lane and the victim had arguments that ended in Lane's physical outbursts. On the night of the murder, the two had an argument that may well have ended in another physical outburst by Lane. Further, there is a difference between domestic abuse and "problems in private." The defense was not trying to put on evidence of mere "problems;" the defense was trying to put on evidence of Lane's pattern of control and physical violence.

Finally, it is incorrect that the other acts evidence was "character" evidence, as the court seemed to believe (160:22-25). It is certainly true that the evidence reflects somewhat on Lane's character—suggesting that he is an angry, violent person—but so too did the other acts evidence in ***Clark***, ***Hunt***, and most other cases involving other acts. Other acts evidence will almost always reflect somewhat on character. The important thing here is that the other acts evidence reflected primarily on permissible ***Sullivan*** purposes, such as motive, intent, plan, preparation, and context. It was not produced merely to show that Lane was generally a bad person who does bad things. Rather, it was produced to show a specific pattern and connection between his other acts and the murder.

CONCLUSION

For the reasons stated, Forbes respectfully requests that this Court reverse his conviction.

Respectfully submitted this ___ day of _____, 2012.

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CERTIFICATION AS TO FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of the brief is _____ words.

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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: (1) a table of contents; (2) relevant trial court record entries; (3) the findings or opinion of the trial court; and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

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 so reproduced to preserve confidentiality and with appropriate references to the record.

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CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, which complies with the requirements of s. 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of 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.

_____

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TABLE OF APPENDICES