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IN THE STATE OF WISCONSIN COURT OF APPEALS DISTRICT IV

Case No. 2024AP1941

Case No. 2024AP1942

STATE OF WISCONSIN,
Plaintiff/Respondent,

Vs.

EMIL L. MELSSEN,
Defendant/Appellant.

Circuit Court of Lafayette County
Circuit Case Nos. 2021cf000026, 2021cf000029
Alan Bates, Judge

CONSOLIDATED BRIEF OF APPELLANT

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ISSUES PRESENTED FOR REVIEW

1. The Circuit Court Erred in Not Granting Mr. Melssen's Motion to Suppress. Mr. Melssen moved the Circuit Court to Suppress the evidence obtained by the State during the execution of two search warrants because he believed the applications for the warrants were not supported by probable cause. The Circuit Court denied the motion.
2. The Circuit Court Erred by Admitting Evidence of Mr. Melssen's Prior Bad Acts. During the trial in case #2021CF000026 the Court allowed evidence of Mr. Melssen's narcotics activities to be presented to the jury.
3. The State did not Present Sufficient Evidence to Sustain the Convictions. At the close of the State's case in both trials the Defense made a motion for a Judgment of Acquittal because the State had failed to present sufficient evidence to sustain a conviction, both times the Circuit Court denied the motions.

STATEMENT ON ORAL ARGUMENT

The Appellant believes oral argument is necessary in this case because of the nuanced nature of the presentation of the evidence in this case.

STATEMENT ON PUBLICATION

The Appellant does not feel the case would need to be published as it does not appear it presents a new or unique question of law.

STATEMENT OF THE CASE

On May 25, 2021, Emil Melssen was traveling to his friend's house on his way to Dubuque, IA to pick up a vehicle by trailer. (2021CF000026 Docket # 131 p. 11, Appendix p. 151) His friend, Miranda Muchow, had been having trouble with her ex-boyfriend and had called Mr. Melssen for advice. (2021CF000026 Docket # 131 pp. 11-12, Appendix pp. 151-152) Earlier that day, Ms. Muchow's ex, B.R.E., had physically assaulted her and took her wallet, stating he wouldn't return it. (2021CF000026 Docket # 130 p. 149, Appendix p. 146)

Ms. Muchow had reached out to Mr. Melssen for consolation and in response to this Mr. Melssen invited her to come along with him to Dubuque and she accepted his invitation. (2021CF000026 Docket # 131 pp. 11-12, Appendix pp. 151-152) Ultimately, they decided to meet at Ms. Muchow's residence. (2021CF000026 Docket # 131 p. 12, Appendix p. 152)

Concurrently, Ms. Muchow continued to have communication with B.R.E. about her wallet. After some conversation he agreed to meet her at her residence as well and traveled there alone in his Chevrolet Tahoe. (2021CF000026 Docket #

130 p. 150, Appendix p. 147) When he arrived B.R.E. discovered Ms. Muchow was still in the shower and he decided to wait for her in his Tahoe. (2021CF000026 Docket # 130 p. 113, Appendix p. 141) A few minutes later, Mr. Melssen also arrived at Ms. Muchow's in his pickup truck with a trailer in tow. (2021CF000026 Docket # 130 p. 113, Docket # 131 p.14, Appendix pp. 141, 154) As Mr. Melssen approached, he parked his vehicle behind B.R.E.'s Tahoe. (2021CF000026 Docket # 130 p. 113, Docket # 131 p.14, Appendix p. 141, 154) After parking his vehicle, Mr. Melssen decided to approach B.R.E.'s vehicle about some money he owed Mr. Melssen for some mechanic's work he had done for him. (2021CF000026 Docket # 131 p. 15, Appendix p. 155) As Mr. Melssen approached the driver's side window, he felt what he described as a "prick" on his left arm. (2021CF000026 Docket # 131 pp. 15-16, Appendix p. 155-156) Mr. Melssen looked down and realized B.R.E. had stabbed him in the arm. (2021CF000026 Docket # 131 p. 17, Appendix p. 157) Reflexively, Mr. Melssen stuck B.R.E. in the face and a scuffle ensued. (2021CF000026 Docket # 131 pp. 17-18, Appendix p. 157-158) Ultimately, B.R.E. fled the scene and Mr. Melssen began first aid on his wounds with the help of Ms. Muchow and a good Samaritan, (2021CF000026 Docket # 131 pp. 23-25, Appendix p. 159-161) Ms. Muchow called 911. (2021CF000026 Docket # 130 p. 157, Appendix p. 148)

The first officer on the scene was Lafayette Deputy Sheriff Brandon Gudgeon. (2021CF000026 Docket # 130 p. 97, Appendix p. 137) When Deputy Gudgeon arrived on the scene, he observed Mr. Melssen's injuries and began an investigation. (2021CF000026 Docket # 130 pp. 98-99, Appendix pp. 138-139) Shortly after he arrived Deputy Gudgeon observed Ms. Muchow receive a phone call. (2021CF000026 Docket # 130 p. 99, Appendix p. 139) The phone call was from B.R.E. and he asked to speak to the officer. After a short exchange with B.R.E., B.R.E. agreed to meet with the deputy and Deputy Gudgeon left to meet with B.R.E. at his location. (2021CF000026 Docket # 130 pp. 99-100, Appendix pp. 139-140)

Upon arriving on the scene with B.R.E. Deputy Gudgeon and other officers were able to determine that an altercation had happened., B.R.E. admitted he had stabbed Mr. Melssen but investigators were unable to locate the knife. (2021CF000026 Docket # 130 p. 100, p.218, Appendix p. 140, 149) Additionally, investigators found a syringe used for methamphetamine in B.R.E.'s Tahoe and B.R.E. stated to investigators that he was concerned about Mr. Melssen's relationship with Ms. Muchow, that he had used methamphetamine that day, and that Mr. Melssen and Ms. Muchow frequently texted about drugs. (2021CF000026 Docket # 130 p. 234, Appendix p. 150)

Mr. Melssen was transported to the hospital via ambulance and treated for his injuries. Eventually, Mr. Melssen was arrested for battery. While Mr. Melssen was in custody officers applied for a warrant to search Mr. Melssen's cell phone. (2021CF000026 Docket # 29 pp. 3-12, Appendix pp. 48-57) In support of the application the officers stated they believed the cell phone contained information related to the assault and would help establish a timeline. Additionally, they cited the statement from B.R.E., among other facts to support a search for narcotics activities, the Court granted the search warrant.(2021CF000026 Docket # 29 p. 10, Appendix p. 55)

During the execution of the search warrant, investigators revealed information which indicated Mr. Melssen was involved in illicit activity. Based on this information, the officers applied for a second warrant for a search of Mr. Melssen's residence, and that application was also granted. (2021CF000026 Docket # 29 pp. 13-21, Appendix p. 58-66) The search of Mr. Melssen's residence revealed approximately 12.5 grams of methamphetamine, drug paraphernalia, and indicia of drug use. The vast majority of the methamphetamine, 11.7 grams, was found in a locked car not registered to or owned by Mr. Melssen. (2021CF000029 Docket # 132 p. 159, Appendix p. 174)

On June 4, 2021, Mr. Melssen was charged with Substantial Battery, Criminal Destruction of Property, and Disorderly Conduct out of the incident with

B.R.E. in Lafayette County case number 2021cf000026. (2021CF000026 Docket # 2 p. 1-13, Appendix pp. 3-15) On June 9, 2021, he was charged with Possession with Intent to Deliver Methamphetamine, Possession of Drug Paraphernalia, and Keeping a Drug Trafficking Place in Lafayette County case number 2021cf000029. (2021CF000029 Docket # 2 p. 1-9, Appendix pp. 16-24)

On November 10, 2021, Mr. Melssen moved to suppress all the evidence obtained during the execution of the two search warrants stating they were not supported by probable cause. (2021CF000026 Docket # 28 pp. 1-23, Appendix pp. 25-47) On March 11, 2022, the Court denied the motion.

On April 10, 2024, case #26 proceeded to trial by jury, during the presentation of evidence the Court allowed the state to present evidence of Mr. Melssen's narcotics activities. On April 11, 2024, the jury found Mr. Melssen guilty of Substantial Battery and Disorderly Conduct, and acquitted him of Criminal Damage to Property. (2021CF000026 Docket # 97 p. 1-3, Appendix pp. 177-179) On June 12, 2024, Mr. Melssen proceeded to trial in case# 29. On June 13, 2024, the jury returned verdicts of guilty on all three counts. (2021CF000029 Docket # 104 p. 1-3, Appendix pp. 180-182) On June 17, 2024, the Court sentenced Mr. Melssen to concurrent sentences that resulted in two years of confinement followed by two years of extended release, Mr. Melssen filed a timely Notice of Appeal. (2021CF000026 Docket # 109 pp. 1-2, 2021CF000026 Docket #

107 pp. 1-2, 2021CF000029 Docket # 113 pp. 1-2, 2021CF000026 Docket # 118, 2021CF000026 Docket # 121, Appendix pp. 183-190).

ARGUMENT

THE CIRCUIT COURT ERRED IN NOT GRANTING MR. MELSSEN'S MOTION TO SUPPRESS

The Circuit Court should have suppressed all the evidence obtained by both the search warrants in these two cases because neither were supported by sufficient probable cause and many of the facts used to support the issuance of the second warrant were obtained during the execution of the first warrant.

“[N]o warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” U.S. Const, amend. IV. In order to issue a warrant a judicial officer is required to be “appraised of sufficient facts to excite an honest belief in a reasonable mind that the objects sought are linked with the commission of a crime, and that they will be found in the place to be searched.” *State v. Starke*, 81 Wis.2d 399, 408, 260 N.W.2d 739 (1978). A determination of probable cause cannot be upheld if the affidavit provides nothing more than the legal conclusions of the affiant. *State v. Higginbotham*, 162 Wis.2d 978, 992, 471 N.W.2d 24 (1991). Further, the probable cause finding “cannot be based on the affiant’s suspicions and conclusions.” *State v. Jackson*, 2008 WI App 109, 119, 313 Wis. 2d 162, 178. “The

duty of the judge issuing the warrant is to make: a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the veracity and basis of knowledge of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.” *Id.* at 990. The exclusionary prohibition extends as well to the indirect as the direct products of such invasions. *Wong Sun v. United States*, 371 U.S. 471, 484, 83 S. Ct. 407, 416, 9 L. Ed. 2d 441 (1963).

There was no probable cause to issue a search warrant for Mr. Melssen’s cell phone. Other than reciting the circumstances surrounding the fight between B.R.E. and Mr. Melssen, there were four primary facts the officer cited in support of the warrant, two of which are completely innocuous, one is based on an unconfirmed statement from someone who had just admitted to the officer he was jealous of Mr. Melssen’s new relationship with his ex-girlfriend, had admitted drug use within the last 12 hours, and had drug paraphernalia on him at the time of the statement, the final fact had nothing to do with Mr. Melssen. (2021CF000026 Docket # 28 p. 10, 2021CF000026 Docket # 29 p. 10, Appendix pp. 34, 55) In the application for the warrant the officer states that because of the fight, searching the content Mr. Melssen’s cell phone could help establish a timeline of events, it’s rather obvious that this reason is merely pretext. (2021CF000026 Docket # 29 p. 10, Appendix p. 55) It is highly unlikely that there would be any evidence of an assault on the

phone in question. Before the application was made the officers had the statements of both participants in the assault and two eyewitnesses, at no time did any witness indicate that the phone in question was involved in any way. Neither B.R.E. nor Mr. Melssen stated they had communication of any kind with each other that day. Although Ms. Muchow and Mr. Melssen had admitted they had communicated that day using the phone in question, nothing about their statements had indicated there would be any information on the phone relating to the assault. Simply put, in relation to the assault the officers were conducting nothing more than a “fishing expedition” in relation to the search of the cell phone in relation to the assault.

As stated above, the officer also included four other primary facts in support of the warrant. The first two facts do not indicate criminal activity in this case, and it's hard to imagine a scenario in which these facts could. First, the officer told the Court that while in the ambulance Mr. Melssen was repeatedly sending text messages to someone, and second, that Ms. Muchow had stated Mr. Melssen had sent her several messages from the ambulance. These facts are completely innocuous and do not in any way indicate criminal activity. The officers knew Ms. Muchow and Mr. Melssen were in some sort of relationship and cared about each other's well-being. Further, they knew that Mr. Melssen had just undergone a traumatic event, he had just been stabbed. Communication between two people just after a trauma would be expected, when a close friend or loved one has sustained

an injury communicating concern and your condition is a common activity, it does not indicate criminal activity in anyway. If the Court were to accept this kind of reasoning as a basis for probable cause, it is hard to imagine a scenario in which any type of communication could not be used as suspect.

Next, the officer cited to the Court B.R.E.'s statement that Ms. Muchow and Mr. Melssen often communicate by text and that they were "constantly communicating about drugs and refer to drugs as 'groceries.'" This statement presents two problems for a probable cause analysis, first, the statement on its face does not rise to the level of establishing probable cause, and second, the circumstances surrounding the statement completely undermine any reliability it may have had.

B.R.E.'s statement does not indicate criminal activity in Wisconsin. First, and most obvious, the statement is devoid of any timeframe of the alleged actions. When was the last time the two were texting each other about drugs, that day, the prior week, the prior month, the prior year? The information provided to the Judge gives no information as to whether there is a current crime being committed. Second, talking about drugs is not illegal. B.R.E.'s statement as it was related to the Court does not indicate Mr. Melssen was using drugs, possessing drugs, or selling drugs. Finally, the statement does not indicate what the drugs were or where they were located. This is important because of the geographic location of

Lafayette County. Both Mr. Melssen and Ms. Muchow live within minutes of the Wisconsin-Illinois border. Recreational marijuana is legal in Illinois. It is impossible to tell from the statement presented to the Judge what 'drug' the parties were referring to. Additionally, even if it were reasonable to infer drug use by Mr. Melssen based on B.R.E.'s statement, it would be impossible to tell if that activity wasn't using legal recreational marijuana in Illinois.

Next, even if this statement could be seen to support probable cause, the circumstances under which it was given undermines its credibility and the officers should have appraised the court of the pertinent surrounding fact. First, B.R.E. had a strong motive to exact revenge on both Mr. Melssen and Ms. Muchow. The officers knew these three people were involved in a love triangle. B.R.E. admitted to the officer he was upset about Ms. Muchow and Mr. Melssen's relationship. Additionally, B.R.E. had admitted he had used methamphetamine within the preceding 12 hours, a fact that was corroborated by the discovery of methamphetamine syringes in his vehicle at the scene. The officers here should have apprised the Court of these facts so the Court could have made a proper credibility determination.

The final fact cited to the Court was the fact that it was known to the officer that the sale of methamphetamine had happened at Ms. Muchow's residence while she was a resident there and that she is a known drug user. Again, this statement

presents several problems. First, and most telling, the statement does not indicate that Ms. Muchow was ever involved in any narcotics trafficking. Stating that sales had happened at Ms. Muchow's residence while she was a resident does not support probable cause to search another party's cell phone. Was she present during the sales, did she herself use methamphetamine, does she have roommates? Most importantly, does the fact that Ms. Muchow uses drugs subject any of her acquaintances to a higher likelihood of a search for narcotics? The officer's argument seems to be that because Ms. Muchow is known to be involved in narcotics and Mr. Melssen has a relationship with her, he could be involved with narcotics as well. This line of reasoning completely undermines search and seizure jurisprudence. Almost all of us are acquainted with someone who has broken the law in some manner or another, but this fact should not open a vast majority of people to a search.

The evidence obtained from the second warrant in this case, which authorized the search of the Mr. Melssen's residence, should have been suppressed because the application for that warrant relied heavily on evidence obtained from Mr. Melssen's phone and is the "fruit of the poisonous tree."

In their application for the second search warrant in this case, the officers were able to support probable cause only because of the evidence they found in his phone. (2021CF000026 Docket # 29 p. 14, Appendix p. 59) The officers cited

multiple text conversations found on Mr. Melssen's phone in which he and the other party were talking about narcotics using slang terms, they also included an admission from Mr. Melssen that there was a bong located at his residence. The balance of the application contained nothing but unsubstantiated suspicions of the officers. Without the information obtained pursuant to the first warrant, there would not have been sufficient information to support probable cause and should not have been issued.

This Court should reverse the decision of the Circuit Court and suppress all of the evidence obtained by the execution of both warrants in this case because the Circuit Court issued them without sufficient probable cause.

THE CIRCUIT COURT ERRED BY ADMITTING EVIDENCE OF MR. MELSSEN'S PRIOR BAD ACTS

The Circuit Court allowed inadmissible evidence of Mr. Melssen's prior bad acts to be presented to the jury in case #26 which tainted the jury process, as such this court should vacate Mr. Melssen's convictions and remand the case for a new trial.

Character evidence not admissible to prove conduct; exceptions; other crimes

(1) Character evidence generally. Evidence of a person's character or a trait of the person's character is not admissible for the purpose of proving that the person acted in conformity therewith on a particular occasion, except:

(a) **Character of accused.** Evidence of a pertinent trait of the accused's character offered by an accused, or by the prosecution to rebut the same;

(b) **Character of victim.** Except as provided in s. 972.11(2), evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

(c) **Character of witness.** Evidence of the character of a witness, as provided in ss. 906.07, 906.08 and 906.09.

(2) **Other crimes, wrongs, or acts. (a) General admissibility.** Except as provided in par. (b)2., evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. This subsection does not exclude the evidence when offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

(b) **Greater latitude.** 1. In a criminal proceeding alleging a violation of s. 940.302(2) or of ch. 948, alleging the commission of a serious sex offense, as defined in s. 939.615(1)(b), or of domestic abuse, as defined in s. 968.075(1)(a), or alleging an offense that, following a conviction, is subject to the surcharge in s. 973.055, evidence of any similar acts by the accused is admissible, and is admissible without regard to whether the victim of the crime that is the subject of the proceeding is the same as the victim of the similar act.

2. In a criminal proceeding alleging a violation of s. 940.225(1) or 948.02(1), sub. (1) and par. (a) do not prohibit admitting evidence that a person was convicted of a violation of s. 940.225(1) or 948.02(1) or a comparable offense in another jurisdiction, that is similar to the alleged violation, as evidence of the person's

character in order to show that the person acted in conformity therewith.

Wis. Stat. Ann. § 904.04 (West)

Evidence of character and conduct of witness

(1) Opinion and reputation evidence of character.

Except as provided in s. 972.11(2), the credibility of a witness may be attacked or supported by evidence in the form of reputation or opinion, but subject to the following limitations:

(a) The evidence may refer only to character for truthfulness or untruthfulness.

(b) Except with respect to an accused who testifies in his or her own behalf, evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(2) Specific Instances of Conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's character for truthfulness, other than a conviction of a crime or an adjudication of delinquency as provided in s. 906.09, may not be proved by extrinsic evidence. They may, however, subject to s. 972.11(2), if probative of truthfulness or untruthfulness and not remote in time, be inquired into on cross-examination of the witness or on cross-examination of a witness who testifies to his or her character for truthfulness or untruthfulness.

(3) Testimony by accused or other witnesses. The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the privilege against self-incrimination when examined with respect to matters which relate only to character for truthfulness.

Wis. Stat. Ann. § 906.08 (West)

“Generally, ‘[e]vidence of a person's character or a trait of the person's character is not admissible for the purpose of proving that the person acted in conformity therewith on a particular occasion’ and ‘evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith.’ Wis. Stat. § 904.04(1), (2)(a). However, evidence of other crimes, wrongs, or acts may be admitted ‘when offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.’ Sec. 904.04(2)(a). We apply the Sullivan three-prong test to determine the admissibility of other-acts evidence under § 904.04(2)(a). *Sullivan*, 216 Wis. 2d at 771-72, 576 N.W.2d 30. Under that test, “other-acts evidence is admissible if (1) it is offered for a permissible purpose under ...§ 904.04(2)(a); (2) it is relevant under Wis. Stat. § 904.01; and (3) its probative value is not substantially outweighed by the risk of unfair prejudice under Wis. Stat. § 904.03.” *State v. Dorsey*, 2018 WI 10, ¶¶39, 379 Wis. 2d 386, 906 N.W.2d 158.” *State v. Hill*, 2024 WI App 51, ¶¶ 11, 12 N.W.3d 561, 567–68. “All relevant evidence is admissible, except as otherwise provided by the constitutions of the United States and the state of Wisconsin, by statute, by these rules, or by other rules adopted by the supreme court. Evidence which is not relevant is not admissible.” Wis. Stat. Ann. § 904.02 (West).

Here, the Circuit Court erred twice in ruling evidence admissible. First, the Court allowed Ms. Muchow to testify, over objection, that Mr. Melssen was her drug dealer, this evidence was irrelevant to the case at hand. (2021CF000026 Docket # 130 p. 142, Appendix p. 145) Mr. Melssen was on trial for three counts: Substantial Battery, Criminal Damage to Property, and Disorderly Conduct. The fact that Mr. Melssen may have been involved in the narcotics trade is not an element in any of the crimes charged, nor does that fact make it more or less likely that any of the crimes had happened. Therefore, this evidence violates the prohibition against irrelevant evidence embodied in § 904.02.

Secondly, even if a Court could find this evidence was relevant it fails the other two prongs of the *Sullivan* test. The State did not even advance any pretense that this was being advanced for any acceptable use under § 904.04(2)(a). There was no reason that this was entered except in an attempt to show the jury that his involvement in illicit activities makes him more likely to commit a crime. Additionally, any probative value this evidence could have is far outweighed by unfair prejudice as it put Mr. Melssen in a position where he was compelled to refute these allegations as part of his case.

As just mentioned, Mr. Melssen had to refute the claim that he was Ms. Muchow's drug dealer, which he did during his testimony. In response the State on rebuttal sought to introduce much of the evidence it had recovered in the execution

of the search warrant on Mr. Melssen's residence. Mr. Melssen lodged a timely objection to this evidence as irrelevant, inadmissible prior bad acts evidence, and that it was not a proper mode of impeachment. Originally, the Court agreed with the defense and ruled the evidence inadmissible, but, after hearing from the State that this evidence was a part of the original investigation, the Court ultimately allowed its admission. (2021CF000026 Docket # 131 pp. 95-106, Appendix pp. 162-173)

None of the evidence is allowed under the Rules of Evidence. First as argued before, none of this evidence is relevant, and during its argument the State conceded as such, trying to equate Mr. Melssen's statements to a prior inconsistent statement. Second, the evidence is blatant character evidence of prior bad acts. It does not relate to motive, plan, preparation, or opportunity of the crimes charged. Next, it is not a proper mode of impeachment. The rules make clear there are three permissible ways to impeach a person's character, testimony as to an opinion or reputation for truthfulness or untruthfulness, by proof of a conviction of a crime, and by a prior inconsistent statement.

As Mr. Melssen was not convicted of any crimes at the time of trial this one is obviously inapplicable. Additionally, the evidence is not as to an opinion or reputation for truthfulness or untruthfulness. The witness did not express his opinion or indicate what Mr. Melssen's reputation in the community was, more

telling any evidence allowed for truthfulness cannot be proven by extrinsic evidence, which this obviously is.

Finally, it doesn't fall under § 906.13 as a prior inconsistent statement even though that was a ground advanced by the State at trial. In order to impeach by a prior inconsistent statement a witness must be confronted with a prior statement that is inconsistent with what they have said under oath. What the State convinced the Court to allow as evidence that would suggest the statement made under oath was inconsistent with the prior *actions* of Mr. Melssen. The introduction of this type of evidence is not allowed by the rule.

The Court should vacate Mr. Melssen's convictions for Substantial Battery and Disorderly Conduct and remand this case for a new trial with instructions to the Circuit Court to exclude any evidence of Mr. Melssen's narcotics activities.

**THE STATE DID NOT PRESENT SUFFICIENT EVIDENCE TO SUSTAIN
THE CONVICTIONS**

The State failed to provide sufficient evidence to sustain the convictions in both cases because the evidence presented was not sufficient to prove beyond a reasonable doubt that Mr. Melssen did not act in self-defense in the altercation with B.R.E. and that he had possessed methamphetamine with the intent to deliver.

“The standard of review in determining whether the evidence was sufficient to support a conviction is that ‘an appellate court may not substitute its judgment

for that of the trier of fact unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt.” *State v. Hayes*, 2004 WI 80, ¶ 56, 273 Wis. 2d 1, 24–25, 681 N.W.2d 203, 215.

The State failed to establish beyond a reasonable doubt that Mr. Melssen was not acting in self-defense during the altercation with B.R.E. During his testimony, and in his statements to law enforcement officers that day B.R.E. admitted Mr. Melssen may have only struck him once. (2021CF000026 Docket # 130 p. 119, Appendix p. 144) He also admitted that, in spite of believing Mr. Melssen to be a non-violent person and that he didn’t seem like the type of person who would commit an assault, he prepared a knife for use as Mr. Melssen approached his vehicle. Additionally, B.R.E. had admitted he had used methamphetamine on the day in question and that he had been in a physical altercation with Ms. Muchow just moments earlier. (2021CF000026 Docket # 28 p. 3, Appendix p. 27) Most telling, B.R.E. admitted that he was upset by Mr. Melssen’s and Ms. Muchow’s blooming relationship. (2021CF000026 Docket # 130 p. 115, Appendix p. 142)

Mr. Melssen testified that he was stabbed immediately as he approached B.R.E.’s vehicle and that he swung and struck B.R.E. out of reaction (2021CF000026 Docket # 131 pp. 15-17, Appendix pp. 155-157) There were no other witnesses that saw the beginning of the altercation between Mr. Melssen and

B.R.E. Under these facts, a reasonable jury could not have found beyond a reasonable doubt that Mr. Melssen was not acting in self-defense.

Similarly, the State failed to provide sufficient evidence to sustain Mr. Melssen's convictions for Possession with Intent to Deliver and Maintaining a Drug Trafficking Place. At trial, the evidence unequivocally established that the vast majority of the methamphetamine found at Mr. Melssen's residence, approximately 11.7 out of an estimated 12.5 grams, were found in a vehicle on Mr. Melssen's property which he did not have access to. During the presentation of the State's case, it was established that 11.77 grams of methamphetamine was found inside the glove box of a locked gray Audi. (2021CF000029 Docket # 132 p. 159, Appendix p. 174) A search of Mr. Melssen's home did not reveal any keys that would have allowed Mr. Melssen access to the drugs. (2021CF000029 Docket # 132 p. 239, Appendix p. 176) In fact, the officers had to use special tools to access the inside of the vehicle. (2021CF000029 Docket # 132 p. 238, Appendix p. 175) During testimony the State's evidence showed the vehicle in question belonged to someone else, a gentleman named Casey Radtke, a friend of Mr. Melssen's. No evidence was ever shown that would have allowed a reasonable jury to believe Mr. Melssen even knew about, let alone possessed, the contraband found in the Audi.

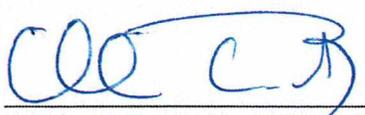
Absent that evidence the only drugs found at Mr. Melssen's residence were approximately four doses of methamphetamine, hardly enough to establish a drug trafficking scheme.

CONCLUSION

This Court should vacate and dismiss Mr. Melssen's convictions for Possession with Intent Deliver Methamphetamine and Maintaining a Drug Trafficking Place because the Circuit Court erred in denying Mr. Melssen's Motion to Suppress and because the State has failed to present sufficient evidence to sustain the convictions under each count. The Court should vacate and dismiss Mr. Melssen's conviction for Possession of Drug Paraphernalia because the Circuit Court Erred in denying Mr. Melssen's Motion to Suppress. This Court should vacate and dismiss Mr. Melssen's convictions for Substantial Battery and Disorderly Conduct because the State failed to provide sufficient evidence showing Mr. Melssen did not act in self-defense, or in the alternative vacate these two convictions and order a new trial on them because the Circuit Court erred in allowing improper character evidence to be shown to the jury.



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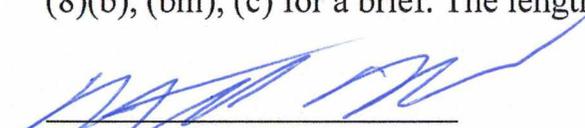
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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19

(8)(b), (bm), (c) for a brief. The length of this brief is 5936 words.



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I hereby certify that filed with this brief is an appendix that complies with s. 809.19

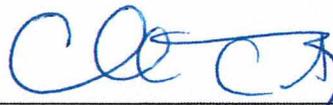
(2) (a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23 (3) (a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

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 one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.



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