**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

March 19, 1998

**Marilyn L. Graves**
**Clerk, Court of Appeals**
**of Wisconsin**

**NOTICE**

**This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.**

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

**No. 97-2968-CR**

**STATE OF WISCONSIN** **IN COURT OF APPEALS**
**DISTRICT IV**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**ROBERT LINTZ,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Dodge County: JOHN R. STORCK, Judge. *Reversed and cause remanded with directions.*

EICH, C.J.[1] Robert Lintz appeals from a judgment convicting him of operating a motor vehicle while intoxicated and disorderly conduct—both misdemeanors—and from an order denying his postconviction motion for a new trial. He was convicted after a jury trial at which he appeared without an attorney.

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[1] This appeal is decided by a single judge pursuant to § 752.31(2)(f), STATS.

He raises two arguments: (1) the trial court erred when it granted the State's motion to exclude from evidence certain statements allegedly made by the arresting officer; and (2) it erred by denying his motion for a new trial based on the claim that he had not knowingly waived his right to be represented by counsel. We conclude that the trial court erroneously excluded the proffered evidence and grant a new trial on that basis. Accordingly, we do not reach the waiver-of-counsel argument.

As indicated, Lintz was arrested for driving while intoxicated and for a subsequent altercation with the arresting officer. At trial, Lintz was prepared to present a witness who he said would testify that the arresting officer had, on an earlier occasion, told Lintz: "I'll get you, Lintz, when you least expect it." The State moved, in limine, to bar introduction of the evidence. The trial court granted the motion, ruling as follows:

> I'm going to try to explain [this] as best that I can. Under Section 906.08(2), Wisconsin Statutes, specific instances of conduct of a witness can be used for the purpose of attacking the witness's credibility. However, that section goes on to say that they can only be used if they're not remote in time and you can only use it during cross-examination of that witness and you can't use what's called extrinsic evidence concerning that specific instance of conduct of a witness. The Court will permit you, when the officer is on the stand, to ask the officer: Officer, in 1992 did you make this statement to me. Okay –
>
> ROBERT LINTZ: Right.
>
> THE COURT: – I will permit that question. However, I will not permit you to offer extrinsic evidence concerning that issue. In other words, you can't bring in another witness who will say what happened, even if that witness would testify that something other than what the officer said occurred. That's extrinsic evidence. This evidentiary rule … is so that a trial does not turn out to be a trial of other mini issues. We're not here to try what happened in 1992. We're here to try what happened in 1996. So I will permit you to ask that question but I'm not going to permit you to put [on] any other … witness … to testify what happened in 1992. Likewise, you're not permitted to

> testify what happened in 1992. That's extrinsic evidence….
>
> ….
>
> Mr. Lintz, do you understand [my ruling]?
>
> ROBERT LINTZ: I understand it, your Honor, but … part of my defense in this whole deal is to show vindictive behavior on the part of Officer Trevarthen and it's going to be almost impossible for me to do without some kind of background and witness that will testify this incident that did happen…. It's relevant. You know … if it's not allowed, then it's going to be just the cops picking on me again and the whole same story. This is why I brought the witnesses in. It is relevant and it does show malicious behavior on the part of Officer Trevarthen. This is what I intend to prove along with my innocence of the alleged OWI.
>
> THE COURT: Okay, you've made a record.

Lintz, who is now represented by counsel, argues that the basis for the court's granting the motion was erroneous—that § 906.08(2), STATS. does not apply here because the proffered evidence "was not an attempt to bring in other incidents where the officer did not tell the truth" but, rather, "went directly to the credibility of the officer regarding the alleged crime" by putting into question the officer's "motive to fabricate." He says that he "should have been able to ask the officer if he made that statement," and that if the officer denied it, he should have been able to have his witness testify, presumably to impeach the officer's denial.

The State's argument is limited to a single proposition: that Lintz, in effect, waived any such argument because he never specifically asked the officer whether he had made such a statement—asking him only whether they had had an "encounter" in the past, which the officer conceded. We do not believe Lintz can be faulted for not asking the question, however, in light of the trial court's express and repeated admonitions to him that, under § 906.08(2), STATS., if the officer did

not agree with Lintz, he would be barred from offering *any* evidence to rebut or impeach that denial. And the trial court's ruling was in error.

Section 906.08, STATS., deals with "[e]vidence of character and conduct of [a] witness." Section 906.08(1) permits the introduction of "[o]pinion and reputation evidence of character" to challenge a witness's credibility, while § 906.08(2), the one at issue here, concerns evidence of "[s]pecific instances of conduct" of a witness. It states:

> **(2)** …. Specific instances of the conduct of the witness, for the purpose of attacking or supporting the witness's credibility … may not be proved by extrinsic evidence. They may, however … if probative of truthfulness or untruthfulness and not remote in time, be inquired into on cross-examination of the witness ….

The Judicial Council's note to § 906.08(2), STATS., indicates that "the limitation upon the use of extrinsic evidence to attack credibility is in conformity with an ancient rule grounded upon confusion of issues and unfair surprise." Judicial Council Committee's Note, WIS. STAT. ANN. § 906.08 (West 1993). This is not such a situation. It is, rather, one where the court's ruling foreclosed Lintz from offering evidence of prior inconsistent statements should the officer deny making the statement at issue. Such statements are admissible under § 906.13(2), STATS., which provides in part:

> **(2)** …. Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless … the witness was so examined while testifying as to give the witness an opportunity to explain or to deny the statement ….

In other words, extrinsic evidence of a prior inconsistent statement *is* admissible if the witness is given the opportunity to explain or deny the statement. In this case, the trial court's ruling expressly barred Lintz from offering such

evidence should the officer deny making the purported statement. In light of the court's ruling—which the court explained to Lintz—we do not believe that he waived his right to challenge it by not asking the initial question. The court had effectively told him that the officer's response would be conclusive—no further inquiry would be permitted—and Lintz cannot be blamed for deciding not to ask the question.

Lintz correctly points out that a defendant's constitutional right to present evidence encompasses both the right to the "effective" cross-examination of witnesses whose testimony is adverse and the right to put on favorable testimony. ***State v. Pulizzano***, 155 Wis.2d 633, 645-46, 456 N.W.2d 325, 330 (1990). The trial court's ruling foreclosing any contrary testimony should the officer deny making the statement effectively abridged those rights—particularly the former—and the State has not disputed the merits of such a proposition, or argued that such an error may be disregarded as harmless or provided any other reason to uphold the trial court's ruling. We are thus constrained to reverse the judgment and order and remand to the trial court with directions to grant Lintz a new trial.

*By the Court*.–Judgment and order reversed and cause remanded with directions.

This opinion will not be published in the official reports. *See* RULE 809.23(1)(b)4, STATS.