STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT I

Case No. 2014AP2252-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

LUIS CALDERON-ENCARNACION,

Defendant-Appellant.

ON APPEAL FROM THE JUDGMENT OF CONVICTION AND SENTENCE ENTERED ON JULY 19, 2013 IN MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE REBECCA DALLET PRESIDING

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUES PRESENTED

I. SHOULD MR. CALDERON BE GRANTED A NEW TRIAL BECAUSE OF THE TRIAL COURT'S ERROR IN ADMITTING OTHER ACTS EVIDENCE?

II. SHOULD MR. CALDERON BE GRANTED A NEW TRIAL BECAUSE OF PREJUDICIAL EVIDENCE THAT WAS ADMITTED THAT IMPLIED PRIOR GANG MEMBERSHIP AND POLICE CONTACTS?

III. WERE THE TRIAL COURT ERRORS IN ADMITTING EVIDENCE HARMLESS?

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Neither is requested as the issue involves well settled areas of law.

STATEMENT OF THE CASE

On February 21, 2013, the State filed a criminal complaint against Luis Calderon-Encarnacion, (hereinafter Mr. Calderon) alleging one count of first degree recklessly endangering safety contrary to § 941.30(1), and §939.50(3)(f), Wis. Stats. A penalty enhancer of a felony repeater was also included as well as a domestic abuse assessment, contrary to § 939.62(1)(c), and § 968.075(1), Wis. Stats.

A second count of possession of a firearm by a felon, was also charged, contrary to § 941.29(2), Wis. Stats. The second count also contained a penalty enhancer of a felony repeater, contrary to § 939.62(1)(b). (2) On March 4, 2013 a preliminary hearing was held. The court found probable cause, and Mr Calderon was bound over for trial. An information was filed on that same date, and Mr. Calderon entered a not guilty plea to both counts. (41)

A final pre-trial hearing was held on May 8, 2013. The prosecutor informed the court that he intended to file a *Whitty* motion for other acts to include the victim's statement that

she had seen Mr. Calderon with a similar gun about a month earlier. (42) The defense asked for a motion hearing on this issue prior to the jury trial, which the court granted. (42:4) The motion for other acts was filed on May 10, 2013. (6) The defense requested that this motion be denied in a motion in limine filed on April 11, 2013. (7)

On May 28, 2013 before the jury panel was called, the motion hearing was held. (44) The trial court granted the prosecutor's request, concluding that the purpose for admitting the statement was proper because it showed knowledge and/or absence of mistake under § 904.04(2), Wis. Stats. (44:4-5)

A jury was empaneled, and a trial proceeded that same day. Mr. Calderon later waived his right to testify. (44:79-81) The trial concluded on May 30, 2013. (48) The jury returned guilty verdicts on both counts of the information. (15,16) On July 18, 2013 the trial court held a sentencing hearing. (49) The court sentenced Mr. Calderon on count one to 7 years of initial confinement in the Wisconsin state prison system, to be followed by 3 years of extended supervision. On count two, the court imposed 4 years of initial confinement, to be followed by 3 years of extended supervision. The court ordered these sentences to be served consecutively to each other. (49:27-28)

The judgment of conviction was entered on July 19, 2013. (24) The defense filed a Notice of Intent to Pursue Post-Conviction relief on July 22, 2013. (23) A notice of appeal was filed on September 24, 2014. (38)

STATEMENT OF FACTS

On February 18, 2013 at approximately 5:00 p.m., Shelly Gustafson and her father, Edward Wismer spoke to Milwaukee police officer Raymond Brock. They told him that Mr. Calderon was Shelly Gustafson's ex-boyfriend. Ms.

Gustafson told Officer Brock that she and Mr. Calderon had a nine month old child together. (2:2) Ms. Gustafson reported that at approximately 4:30 p.m., Mr. Calderon had called her and told her he would drive by her house to "air it out" later that night. She took that to mean that Mr. Calderon intended to shoot up her house. Ms. Gustafson also reported that she had seen Mr. Calderon with a black and silver handgun within the past month. (*Id.)*

Mr. Widmer reported that his daughter then contacted him and that he observed a silver Chevy Blazer parked in front of their house in the afternoon of February 18, 2013. Mr. Widmer recognized the vehicle as belonging to Mr. Calderon from past experience. (*Id.)*

Later that same evening, officers responded to a shots fired call at a residence located at 2430 S. 16th St. in the city and county of Milwaukee. Shelly Gustafson told the police that five minutes before the shooting, she saw Mr. Calderon's Chevy Blazer drive by the residence. She then heard multiple gunshots just outside. She further reported that her mother, her father and her nine month old son were also in that residence when the shots were fired. (*Id.)*

Amanda Watterman told the police that she was in front of the 2430 S. 16th St. residence during the incident. She observed a silver Chevy Blazer with shiny rims that she had seen Mr. Calderon drive several times in the past. She saw a male with a hooded sweatshirt get out of the vehicle who discharged a firearm multiple times at the residence. The male then returned to the vehicle and drove off. (*Id.)*

Officers then conducted a traffic stop of Mr. Calderon's Chevy Blazer less than twenty minutes after the shots were fired. This stop occurred less than two miles from the scene of the shooting. A search of the vehicle revealed a silver revolver with a black handle hidden in the fuse panel within the immediate reaching area of Mr. Calderon, who was

driving. This revolver had five spent casings in the chambers. (*Id.)*

Mr. Widmer pointed out five bullet holes in the house to investigating officers that were not there prior to the shooting on February 18, 2013.

ARGUMENT

I. THE TRIAL COURT VIOLATED MR. CALDERON'S CONSTITUTIONAL RIGHTS TO DUE PROCESS AND TO A FAIR TRIAL BY ADMITTING OTHER ACTS EVIDENCE REGARDING AN ALLEGED PRIOR GUN POSSESSION

A. Standard of Review for Admissibility of Other Acts Evidence

The standard of review for the admission of other crimes or acts evidence is an erroneous of discretion standard. An appellate court will uphold the trial court's ruling if the trial court "examined the relevant facts; applied a proper standard of law; and using a demonstrative rational process, reached a conclusion that a reasonable judge could reach." ***State v. Sullivan,*** 216 Wis. 2d 768, 780-781, 576 N.W.2d 30 (1998).

An erroneous exercise of discretion occurs when a circuit court fails to set forth the factors that influenced its decision. When this happens, the appellate courts will independently review the record to determine whether it properly supports the circuit court's decision. ***State v. Hunt***, 2003 WI 81, ¶ 44, 263 Wis. 2d 1, 666 N.W.2d 771.

The admissibility of other acts evidence is also governed by Wis. Stats. § 904.04(2) which states:

> 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.

The general policy of the statute is one of exclusion. ***State v. Johnson***, 184 Wis. 2d 324, 336, 516 N.W.2d 463 (Ct. App. 1994). Such evidence is not admissible to prove a person's character in order to show the person acted in conformity with that character in committing the offense. In ***State v. Sullivan,*** 216 Wis. 2d at 782, the Wisconsin Supreme Court stated that Wis. Stat. § 904.04(2) "forbids a chain of inferences running from act to character to conduct in conformity with the character."

The Wisconsin Supreme Court explained the reasons for strictly limiting the admission of other acts evidence in ***Whitty v. State***, 34 Wis. 2d 278, 292, 149 N.W.2d 557 (1967):

> (1) the overstrong tendency to believe the defendant guilty of the charge merely because he is a person likely to do such acts; (2) the tendency to condemn not because he is believed guilty of the present charge but because he has escaped punishment from other offenses; (3) the injustice of attacking one who is not prepared to demonstrate the attacking evidence is fabricated; and (4) the confusion of issues which might result from bringing in evidence of other crimes.

In ***State v. Sullivan***, 216 Wis. 2d at 772-773, the Supreme Court set out a three-step analysis to determine the admissibility of other crimes evidence. First, the court must determine whether the other acts evidence is offered for an acceptable purpose under Wis. Stat. § 904.04(2). Second, the

court must then decide whether the other acts evidence is relevant, considering Wis. Stat. § 904.01. Finally, the court then must weigh the probative value of the other acts evidence against the danger of unfair prejudice, confusion of issues or misleading the jury, considerations of undue delay, waste or time or needless presentation of cumulative evidence.

B. The trial court erred in applying the *Sullivan* test in determining relevance of the alleged prior act of gun possession

The Wisconsin Supreme Court clearly stated that under some circumstances, the standards of relevancy in determining the admissibility of other acts should be stricter.

> We think that the standards of relevancy should be stricter when prior-crime evidence is used to prove identity or the doing the act charged than when evidence is offered on the issue of knowledge, intent or other state of mind. [Citation omitted]

Whitty v. State, 34 Wis. 2d 278, 294, 149 N.W.2d 557 (1967).

Just before the jury was selected, the trial court ruled that the State would be allowed to introduce evidence that the victim saw Mr. Calderon about a month earlier with a black and silver gun. (44:5) The court stated that whether or not Mr. Calderon had the gun previously would tend to prove that he knew the gun was in the vehicle when he was arrested on February 18, 2013. ***Id.***

1. The alleged act of prior gun possession does not prove where the gun was stored

The proffered evidence given to the trial court just before trial did not indicate anything about where the gun was stored. Instead, the State argued:

> In this case the State's intent, as I have outlined in my motion, is to elicit testimony from the victim in this case, Shelly Gustavson,[sic] that about a month prior to the incident in this case which occurred on February 18, 2013 she observed the defendant, Mr. Luis Calderon Encarnacion, with a weapon that matched the description of the weapon that was eventually found in the defendant's vehicle, and it is the State's contention that that is the gun that was used in the shooting in this case.
>
> It is the State's intent, as I have outlined in my motion, that this evidence is being used for purposes of establishing the identity of the shooter. (44:2-3)

An alleged act of prior possession does not establish where the gun was stored, either in general or in particular on the day of Mr. Calderon's arrest.

Second, the description is vague, including only the colors seen by the victim.[1] The State's contention that the gun the victim observed was in fact the same gun found in the vehicle at the time of Mr. Calderon's arrest is conjecture. It is based upon two assumptions: first that the gun in both incidents was the same, and that Mr. Calderon had knowledge of the gun's hidden location when he was arrested.

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[1] At trial, an officer testified that the victim was also able to identify the gun as a revolver because it had a bulky cylinder. (47:42-43)

2. The trial court erred in concluding that the alleged prior act of possession of a gun had very high probative value

In ***State v. Payano,*** 2009 WI 86, ¶ 81, 320 Wis. 2d 224, 768 N.W.2d 832, the Wisconsin Supreme Court stated:

> The main consideration in assessing probative value of other acts evidence "is the extent to which the proffered proposition is in substantial dispute"; in other words, "how badly needed is the other acts evidence?" [Citations omitted]

Simply put, the victim's observation of an alleged prior gun possession isn't needed for the State's case. This gives it an extremely low probative value. Knowledge of the gun's location can be inferred from the fact that Mr. Calderon was arrested shortly after the shooting, and that the hidden gun was within his reach on the driver's side. If the testimony about the search of the vehicle is believed, no other prior acts are needed.

Probative value also depends on the other incident's nearness in time, place and circumstances to the alleged crime. ***State v. Sullivan,*** 216 Wis. 2d 768, 786, 576 N.W.2d 30 (1998). The ***Sullivan*** court also stated: "The greater the similarity, complexity and distinctiveness of the events, the stronger is the case for admission of the other acts evidence." ***Id.*** at 787. The other acts evidence fails to be probative under this analysis.

The only significant similarity between the other acts evidence and the crime charged of felon in possession, is that the gun was silver with a black handle. There was no complexity or distinctive detail given in the victim's interview with the police. We do not know if the victim

allegedly saw Mr. Calderon holding the gun, or if it was tucked in his waistband, or carried in some other way. We don't know the time of day or even the location.

For the felon in possession charge, the gun was found in a hidden compartment of a car. The prior incident seen by the victim did not involve an automobile, and the gun was apparently carried in such a way as to be directly seen.

As was true in the ***Sullivan*** case, the State's comparison involves only one other incident and not a series of incidents. See ***State v. Sullivan,*** *supra,* at 788. This further weakens similarity and causes probative value to be extremely low.

3. The prior acts evidence fails to be relevant under the *Sullivan* standards

The State's original pre-trial motion requested that the acceptable purpose for admission of other acts evidence was for identification of the shooter. In ***State v. Fishnick,*** 127 Wis. 2d 247, ,263, 378 N.W.2d 272 (1986) the Wisconsin Supreme Court further defines what an acceptable purpose of identification should contain:

> These similarities may be established, for example, where there is a discernible method of operation from one act to the next [citation omitted], or where the other act and the crime charged and there surrounding circumstances are so similar that the incidents and circumstances bear the imprint of the defendant. [Citations omitted].

As has just been argued above, there are no details as to the surrounding circumstances of the other acts evidence, with only a vague description of the weapon and the assertion that Mr. Calderon possessed it (although the manner of possession isn't known). This clearly does not contain any

"imprint of the defendant" as there is not enough detail given in the victim's observation.

The court, however, when it ruled on the State's motion, decided to admit this other acts evidence on another set of purposes, namely knowledge and absence of mistake. The court erred in this conclusion for two reasons. First, this ignores the State's original request in the written motion and at the hearing held just before the trial. Second, the alleged prior act of possession is "doing the act charged" in count two. See ***Whitty v. State, supra,*** at 294. Thus the court should have used an identity standard of relevance, which the court failed to do.

However, even under the less strict standard of relevance that the trial court tried to apply, the trial court failed to properly assess probative value because of a nearly total lack of similarity in those events, as argued above. Therefore, the trial court erred in finding that the victim's prior observation of Mr. Calderon was relevant.

C. The trial court erred in balancing probative value against prejudicial effect

The errors argued above were carried forward into the court's balancing of probative value versus prejudicial effect, because the court erroneously concluded that the other acts evidence had very high probative value. (44:5)

This was highly prejudicial to Mr. Calderon because the reference to another gun allows the jury to conclude that Mr. Calderon was an armed and dangerous man. It was never proven that the gun in both the charged counts and the gun allegedly seen by the victim were the same.

This evidence should have been excluded because of its low probative value and the high likelihood of prejudice.

II. THE TRIAL COURT VIOLATED MR. CALDERON'S RIGHT TO DUE PROCESS AND A FAIR TRIAL BY ALLOWING EVIDENCE TO BE ADMITTED THAT SUGGESTED PRIOR GANG MEMBERSHIP AND POLICE CONTACTS

At the motion hearing held just before the jury trial, the defense specifically requested that no mention be made of Mr. Calderon's affiliation with the Latin Kings. (44:6) The trial court ruled that there should be no mention of any kind of gang affiliation on behalf of Mr. Calderon. (*Id.* at 7)

The defense had also requested, its motion in limine, signed on April 11, 2013, that no evidence of alleged acts of criminal or other misconduct evidence prior to the alleged offense be admitted. (7)

At trial, however, Officer Tracy testified: "She indicated to me that she had met Luigi once prior to this incident just briefly. She actually knew that his nickname—Luis' nickname was Luigi and he was also a member of—" (47:27) The prosecutor then moved to strike and the trial court ordered that answer struck. *Id.*

Later on that same day, Officer Brock testified:

> We had actually, myself and my partner, actually heard the call come across the radio and while the dispatcher was giving out some of the info she had mentioned a nickname of a person that we are familiar and have dealt with in the past so we decided to go along with the original investigation squad and give them a hand. (47:35)

A short time later, the defense asked for a side bar and objected to both the statement made by Officer Tracy and Officer Brock's statement. The contents of this side bar were put on the record outside of the presence of the jury. (44:51-

52) The trial court ruled that neither statement created prejudice. The first one was stricken, and the second one did not mention specifically what the past contacts were. (44:54)

A. The defense's objections to both statements were properly preserved

The assistant attorney general will likely argue that the defense waived its right to object because the objection was not made contemporaneously. See ***State v. Davis,*** 199 Wis. 2d 513, 519, 545 N.W.2d 244 (Ct. App. 1995). First, although the objection raised at side bar was not done immediately after each statement, it was done a short time later, during the jury mid-afternoon break. (44:51) This gave the trial court and the prosecutor time to respond to the objection, and for the court to consider how these errors should be handled.

Second, the defense's motion in limine raised both the gang reference issue and any misconduct issue prior to the events alleged in the complaint. (7) In ***State v. Bergeron,*** 162 Wis. 2d 521, 528, 470 N.W.2d 322 (Ct. App. 1991), the Court of Appeals stated that "A defendant who has raised a motion in limine generally preserves the right to appeal on the issue raised by the motion without also objecting at trial."

B. The trial court failed to properly assess the level of prejudice

The trial court failed to assess the cumulative level of prejudice. While it is true that both statements were not detailed, the trial court misses the point.

Officer Tracy had just testified that Ms. Waterman knew Luis's nickname was Luigi. The jury then heard "and he was also a member of—" clearly. The inference that he was a gang member was highly likely, and certainly prejudicial.

In ***State v. Burton,*** 207 WI App 237, 306 Wis. 2d 403, 743 N.W.2d 152, the Court of Appeals reversed a conviction because the State failed to establish the fact of the defendant's gang affiliation *Id.* at ¶ 14 (quoting *State v. Long*, 2002 WI App 114, 225 Wis. 2d 729, 647 N.W.2d 884). However, the State in that case introduced evidence through a police detective that the defendant had a lot of police contacts and associated with three known gang members. (*Id.* at ¶ 8) In this case, State had already agreed not to make any references to gang affiliation or association.

Officer Brock's reference that he had dealt with Mr. Calderon in the past also raises the highly likely inference that Mr. Calderon had engaged in misconduct, which is the reason the police were familiar with his nickname. Mr. Calderon had attracted police attention many times in the past. This leads to the conclusion that he was at least a troublemaker, and therefore more likely to commit a criminal act. This is an improper character reference forbidden by Wisconsin statutes and case law.

III. THESE ERRORS ARE NOT HARMLESS BECAUSE THEY CONTRIBUTED TO MR. CALDERON'S CONVICTIONS ON BOTH COUNTS

The test for harmless error is whether there is a reasonable possibility that the error contributed to the conviction. The conviction must be reversed unless the court is certain the error did not influence the jury. ***State v. Sullivan, supra,*** at 792. See also ***State v. Dyess,*** 124 Wis. 2d 525, 541-43, 370 N.W.2d 222 (1985).

It is highly likely that the errors argued above contributed heavily to Mr. Calderon's conviction on both counts. These errors leads to the conclusion that Mr. Calderon was, at a minimum, a dangerous troublemaker who had

carried a weapon. He was, therefore, much more likely to have committed the counts that were charged.

The cumulative effect of these mistakes taints the integrity of the jury verdicts.

CONCLUSION

For the reasons stated above, Mr. Calderon respectfully requests that his judgment of conviction be vacated, and that the case be remanded for a new trial.

Dated this 13th day of March, 2015.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 4,484 words.

Dated this 13th day of March, 2015.

Signed:

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after 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.

Dated this 13th day of March, 2015.

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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, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) 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 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 been so reproduced to preserve confidentiality and with appropriate references to the record.

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