STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2014AP2252-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

LUIS CALDERON-ENCARNACION, JR.

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION, ENTERED IN THE CIRCUIT COURT FOR MILWAUKEE COUNTY, THE HONORABLE REBECCA DALLET, PRESIDING

BRIEF AND SUPPLEMENTAL APPENDIX OF PLAINTIFF-RESPONDENT

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TABLE OF CONTENTS

CASES

Page

STATUTES

STATE OF WISCONSIN

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State submits that neither oral argument nor publication are warranted. The briefs of the parties adequately develop the law and facts necessary for the disposition of the appeal, and this case can be decided by applying well-established legal principles to the facts.

SUPPLEMENTAL STATEMENT OF FACTS

Complaint

Calderon[1] was charged with one count of recklessly endangering safety, as a repeater, with a domestic abuse assessment, stemming from allegations that he shot at the victim's[2] house in a drive-by shooting (2:1-3). Calderon was also charged with one count of possession of firearm by a felon, as a repeater, stemming from the same incident (*id.*).

Other acts motion

In a pre-trial motion *in limine*, the State sought to introduce "other acts" evidence that the victim had seen Calderon with a firearm earlier in the month, and had described the gun as a silver revolver with a black handle (6:1-2). The State proffered the evidence in support of the reckless endangerment charge, as being relevant to prove the identity of the shooter in the car who shot at the victim's house (6:3).

Calderon opposed the motion, and also filed his own motion *in limine* to exclude any evidence of Calderon's "past connection to Hispanic youth gangs, or specifically the Latin Kings" (7:1).

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[1]For ease of reference, the State will refer to Calderon-Encarnacion as "Calderon," as is his preference (44:8-9 [R-Ap. 108-109]).

[2]In order to protect her identity, the State will refer to the victim only by the designation "the victim." *See* Wis. Stat. § 809.86.

Sullivan hearing

On May 28, 2013, the circuit court held a *Sullivan*[3] hearing on the other acts motions (44:1-13 [R-Ap. 101-113]).[4] The State again proffered its other acts evidence as being relevant to establish the identity of the shooter, but added that the evidence was also relevant to rebut Calderon's assertion of mistake or absence of knowledge that the gun was in the vehicle (44:3-4 [R-Ap. 103-104]).

Calderon opposed the motion, arguing that the defense theory was that he did not know the firearm was inside the vehicle (44:4 [R-Ap. 104]).

In ruling on the State's motion, the circuit court acknowledged that, under Wis. Stat. § 904.04(2), absence of knowledge or mistake were proper purposes for the evidence (44:4 [R-Ap. 104]). The court continued that, in this case, knowledge and absence of mistake were acceptable purposes, "more so than identity" (44:4 [R-Ap. 104]).

As to relevance, the circuit court found that the "whole issue" in the case was whether Calderon "shot the gun and was he found in the car with the gun shortly after?" (44:4 [R-Ap. 104]). The court continued:

> So certainly whether or not he had that gun before does potentially go toward certainly at least [the] felon in possession of a firearm charge as means of him knowing that that gun was there. It goes to prove that specific fact.

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[3]*State v. Sullivan*, 216 Wis. 2d 768, 576 N.W.2d 30 (1998).

[4]For the court's convenience, the State has included in its appendix (R-Ap. 101-113) the transcript of the *Sullivan* hearing, because Calderon has failed to do so. The State also includes the excerpt of the sidebar (44:51-55 [R-Ap. 114-118]).

> So it is relevant even if it doesn't go to whether he actually fired the weapon.

(44:5 [R-Ap. 105]).

Further, as to the potential prejudice of the evidence, the court explained:

> I think that given the probative value which is very high because of the allegation that he was a felon and that this was his gun in the car and given that it's not going to take a lot of time in terms of any kind of undue delay, you are talking about the same witness being asked a couple questions, I assume. I don't think it confuses or misleads the jury, and I certainly don't think it's cumulative. So I don't think that the … probative value is substantially outweighed (sic) by the danger of unfair prejudice. So I'm going to allow that testimony.

(44:5 [R-Ap. 105]).

The court then asked whether there were any other witnesses who saw the gun, and the prosecutor replied that he would instruct the other witness—the victim's father—not to testify that he previously saw Calderon with the gun, not to describe the gun's characteristics, and not to mention the gun at all (44:5-6 [R-Ap. 105-106]).

The court noted, "That is appropriate," and reiterated that it was proper for the victim to testify as to the other acts that "this was the handgun that looked like the one that was found in the car" (44:6 [R-Ap. 106]).

With respect to Calderon's other acts motion, defense counsel again asked that "no mention be made that my client has any affiliation with the Latin Kings or any

mention of that during the trial" (44:6 [R-Ap. 106]). The prosecutor responded that he did not intend to ask about it, "unless for some reason the defense opens the door" (44:6-7 [R-Ap. 106-107]). The prosecutor also noted that the incident was not motivated by "any gang-related retaliation" but instead stemmed from domestic violence against the victim (44:7-8 [R-Ap. 107-108]).

The circuit court agreed that Calderon's gang affiliation had no relevance to the charges, and ruled that "there should be no mention of any kind of gang affiliation on behalf of Mr. Calderon, and you should instruct your witnesses to that effect" (44:7 [R-Ap. 107]). The parties agreed (*id.*). Calderon also agreed to the stipulation that he had been previously convicted of a felony, and that the conviction remained unreversed (11; 44:8-13 [R-Ap. 108-113]).

Trial

The victim

At trial, the victim testified she dated Calderon for almost two years, and had a one-year-old son with him, but they had broken up about a year before and Calderon's new girlfriend had been harassing her on the phone (45:89-91). As to the day in question, the victim remembered that Calderon had confronted her over the phone, so she went to the police station and gave a statement to Officer Brock (45:91-94).

She did not recall whether Calderon told her on the phone that he was going to drive by her house and was going to "air it out" (45:92). She did not recall telling Officer Brock

that she had seen Calderon with a silver gun with a black handle (45:94). She did not recall telling her father that Calderon had told her he was going to "air out" the house (*id.*). After being at the police station, the victim later went home to pack because she was leaving her house, but she denied that the phone confrontation with Calderon had anything to do with her leaving (45:94-95).

The victim further testified she did not see Calderon's car before the shooting, but that the next door neighbor saw it (45:95-96). She knew something was wrong because her father had warned her that he had seen Calderon's car (45:97-98). She was inside with her son when gunshots went off, and heard more than one shot but less than ten (45:98).

She did not recall telling Officer Brock that a revolving barrel gun was the type of weapon she had seen Calderon carry before, because she did not know anything about guns (45:98-99). She also did not know what kind of truck Calderon drove, but knew it was gray or silver (45:99).

The victim's father, Ed

The victim's father, Ed, testified he lived with his wife, the victim, and the victim's son (45:101-102). The morning of the incident, he saw Calderon's SUV which had stopped by "in a threatening manner" (45:101-105). Calderon was outside the vehicle right outside their living room window, and asked Ed to come outside because Calderon wanted to talk to the victim (45:105).

Ed testified that Calderon saw him pick up the phone inside, and made some "threatening remarks" before walking away and leaving in his vehicle (45:105-106). The

victim told Ed that Calderon had "texted her saying that he was going to kill her and air out her house" (45:106).[5]

Ed further testified he advised the victim to call the police that morning after seeing a vehicle that he knew to be "Luigi's," but that he ended up calling police instead (46:11-12). After Ed reported to police what his daughter had told him, the victim went down to the police station about an hour-and-a-half to two hours later to show them the text messages (46:12-13). The victim also told one of her friends to get her out of the house because "it was becoming a volatile situation real quick" (46:14).

Ed testified that, after he saw Calderon's car that morning, he again saw "Luigi's" car driving by later that afternoon (46:14-15). Although he did not know whether Calderon owned the car, he had seen Calderon driving the silver Trailblazer in question about a half dozen times (46:28-29). That evening, he again saw the vehicle pass by the house more than once and it concerned him because his daughter, grandson, and wife were in the house (46:15-16). The first time, "he went by at a high rate of speed" and the second time, "[h]e was moving slower" (*id.*).

The first time the car drove by, fast, Ed noticed the driver was "Luigi," which was Calderon's nickname, but could not see anyone else in the car (46:22-23). Ed thought he needed to get his daughter and the baby to safety because

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[5]At that point, defense counsel objected on hearsay grounds (45:106), but the court recessed for the day and the parties agreed to discuss the defense objection the next day (45:106-108). The next day, the court overruled the objection and allowed the answer to stand, holding that the statement was admissible non-hearsay under Wis. Stat. § 908.01(4)(a)1., because it was the victim's prior inconsistent statement (46:4-7, 10).

he was afraid "[t]hat the threats that were made prior to that point were actually being carried through" (46:16). Ed heard the first gunshot as he was trying to barricade everyone—including the victim and her son—inside the closed door (46:16-17).

After the car drove by slowly a second time, gunshots were fired within two to three minutes (46:22-23). No more than 10 to 15 minutes had elapsed between the time Ed first saw Calderon in the vehicle and the time he heard the shots fired from the vehicle (*id.*).

Ed did not see the person who was shooting the gun, but he heard between five and six gunshots (46:17). He immediately called 911, and police arrived within 10 minutes (46:30-31). The next morning, Ed saw four bullet holes in the side of his house that were not there before the shooting, so he again notified police (46:19-21). Officer McGrury arrived to investigate, and saw four bullets stuck in the home's exterior walls (47:5).

The victim's friend, Amanda

The victim's friend, Amanda, testified the victim had called her, "freaked out for her life," and wanted to be picked up because of a "situation" with "Luigi," or Calderon (46:33-36). The plan was that the victim and her son would stay with Amanda until "everything calmed down" with "Luigi," so they packed a diaper bag for the baby and Amanda waited in her car for them (46:37). But before they could leave, Ed saw "Luigi's car" so Ed and the victim went back inside (46:38-39).

Amanda testified that, from her car, she could see the "flash" from the "really nice" rims of the vehicle, but could

not see who was inside (46:39-41). She testified she saw a slender man, around 5 feet 8 inches tall to about 6 feet tall, approaching the house with his hoodie up (46:41-44). She denied that she told Officer Tracy that the suspect had dark jeans on (46:43-44).

She saw a flash from a "red spark," and then heard a gunshot (46:44). She saw a handgun, but denied that she told Officer Tracy that she saw three muzzle flashes and heard four more gunshots (46:51-52). She could not say whether Calderon fired the firearm or what color the firearm was (46:55).

Officer Weber

Officer Weber testified he was patrolling when he heard a call for service for a shots fired complaint, and that the vehicle involved was a 2005 silver Chevy Trailblazer SUV with large chrome wheels (46:60-62). About five minutes later, he observed a vehicle with the same description and license plate number, so he asked for additional backup and initiated a high risk traffic stop (46:62-63).

The sole occupant and driver of the vehicle was Calderon (46:63-64). The traffic stop occurred 12 blocks north and seven blocks east from the victim's house (46:73), no more than a few miles away (47:70-71). Officer Brock later testified that he conducted a registration search, he determined that the vehicle was registered to Calderon's sister (47:43).

Officer Weber secured Calderon in his squad while Officers Keller and Alvarado conducted a search of Calderon's vehicle (46:64-65, 82-84). They indicated there

was a weapon in Calderon's car, and Officer Weber observed an open fuse panel box on the driver's side containing a silver revolver (46:65-66). When Officer Alvarado first discovered the weapon, the fuse box door was "kind of loose" and he had no difficulty opening it (46:85).

Police later determined that the weapon, a Ruger revolver, had five spent casings left inside the revolver after the weapon had discharged (46:67-72).[6] When Calderon was arrested during the traffic stop, Calderon was wearing a dark hoodie and dark colored jeans (46:80).

Officer Tracy

Officer Tracy testified that Amanda told him at the crime scene that she saw a silver Trailblazer with large shiny rims, that she knew to be "Luigi's," drive by at a high rate of speed (47:25, 27). A few moments later, Amanda saw a man dressed in a blue or black hoodie with dark jeans, who then raised his hand to fire shots towards the victim's residence (47:25-26). Amanda said the suspect was average height and stocky (47:26).

Upon being asked whether Amanda told him if she had met "Luigi" before, Officer Tracy answered: "Yes. 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). At that point, defense counsel moved to strike the answer, and the court struck it (*id.*).

[6]A revolver is distinct from a semi-automatic weapon in that the spent casings remain inside a revolver after the weapon is discharged, whereas spent casings eject from a semi-automatic weapon (46:71).

Officer Tracy also said that Amanda told him she saw the first shot, and saw three muzzle flashes from the firearm (47:29). She said she heard three total gunshots before ducking, and then heard four to seven more gunshots thereafter (47:29-30).

Officer Brock

Officer Brock testified that he responded to a location where the victim had reported a threat (47:35). Upon being asked how he learned of the threat, 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 investigating squad and give them a hand.

(47:35). The nickname that dispatch provided was "Luigi," whom Officer Brock knew to be Calderon (47:35-36).

Around 5:00 to 5:30 p.m., the victim and her infant son then met officers at the police station (47:36). She reported that Calderon had threatened her over the telephone earlier that day, and she called her father because the threat involved their house (47:37). At some point, she told her father she was going straight to the police station (*id.*).

Officer Brock testified the victim told him that Calderon's threat "consisted of a phrase I'm going to air your house out which she took to mean that this guy was going to shoot her house" (47:37). The victim also told Officer Brock that she had seen Calderon with a gun, less than a month before, and described the weapon as "[s]ilver with a black handle" (47:37-38). She did not know the difference between revolver and a semi-automatic, but upon being shown photos

of both, she identified Calderon's weapon as being a revolver (47:38-39). She also told Officer Brock that she planned to spend the night at a friend's house, because Calderon did not know where the friend lived so she felt "pretty safe" there (47:39).

Later that evening, around 9:00 p.m., Officer Brock responded to the 911 call about the shooting, and when he arrived at the scene of the traffic stop, he observed the gun that Officer Alvarado had found hidden behind Calderon's fuse panel (47:40). The gun matched the description of Calderon's gun that the victim had described earlier (47:40-41). The victim later confirmed again that Calderon's weapon was a revolver with a bulky cylinder on the side (47:42-43).

The victim also told Officer Brock that she had seen Calderon's Trailblazer about five minutes before the shooting, and had called 911 from a friend's cell phone (47:41-42). Officer Borst later testified that the 911 call came in at 8:50 p.m., and the traffic stop was made at 9:04 p.m. (47:68-69). Officers Borst and Brock went to the victim's house at 9:15 p.m. (47:69).

Officers recovered a bullet embedded in the house, which was then submitted to the crime lab for testing and comparison (47:46-49, 72-73). The firearms and tool marks examiner later testified that the 38 357 caliber bullet—that is, the bullet found embedded in the victim's house—had been fired through the barrel of the Ruger revolver—that is, the gun found in the car Calderon was driving (47:58-62). After a registration search, Officer Brock determined that the gun had been purchased by, and was registered to, an unrelated third party (47:43-45).

Sidebar

During a sidebar, defense counsel put on the record his objection to Officer Tracy's testimony that "Luigi" was a "member of—" (47:51 [R-Ap. 114]). He noted that "the jury still heard that" (*id.*). Defense counsel further objected to Officer Brock's alleged testimony that "we know [Calderon] from the station," but acknowledged the testimony "was unsolicited" (47:52 [R-Ap. 115]).[7] Defense counsel argued that the State was not "controlling the witnesses well" and "those comments are getting made in front of the jury" (*id.*).

The prosecutor responded, "May the record reflect that [Officer Tracy] said a member [of]—and I made some sort of yelp I believe on the record that cut him off. It could have been for all we know a member of the 4-H Club or Lion's Club" (47:52-53 [R-Ap. 115-116]). The prosecutor continued:

> *But nothing came out that was the subject of the motion in limine.* What Officer Brock said was merely that he had known the defendant from past interactions with him. There was nothing, no details or nothing sinister.
>
> I think at this point I have advised my witnesses to avoid making any mention of the defendant's gang affiliation, and *as of right now no one has made a mention of the defendant's gang affiliation.* There was no motion in limine as to whether or not the officers had ever seen the defendant before, and there's nothing to imply that just because an officer has seen somebody in the community before doing their work that that means that for some reason that's a nefarious individual. There was no implication. That was made in passing. It wasn't dwelt upon and we moved on.

(47:53 [R-Ap. 116]) (emphasis added).

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[7]Officer Brock's actual testimony was that they were "familiar with" Calderon and had "dealt with him in the past" (47:35), not that they knew him from the station.

In ruling on the objection, the circuit court noted that the comment did not rise to the level of mistrial, and "the jury doesn't know what that is and you cut him off quickly, [Mr. Prosecutor], which was good" (47:54 [R-Ap. 117]). The court further explained that, in terms of the comment about knowing Calderon from the station, "these aren't generally good things to put out there because they can potentially rise to the level of prejudice" sufficient to warrant a mistrial (*id.*). "But in this case, I don't think that that's at that level now" (*id.*).

As the circuit court further explained, "really this record does not spell out anything for the jurors," and the court had already stricken the answer and instructed the jury to disregard it (47:54 [R-Ap. 117]). The court concluded, "there's no prejudice here," but added that the officers should be careful to not add extra testimony, because it could result in a mistrial (47:54-55 [R-Ap. 117-118]).

ARGUMENT

I. THE CIRCUIT COURT PROPERLY EXERCISED ITS DISCRETION IN ADMITTING THE OTHER ACTS EVIDENCE THAT THE VICTIM HAD SEEN CALDERON WITH A GUN PREVIOUSLY.

A. Relevant legal principles.

1. This court reviews the circuit court's *Sullivan* decision only for an erroneous exercise of discretion.

The decision whether to admit other acts evidence rests within the trial court's sound discretion, and is reviewed for an erroneous exercise of discretion. *State v. Sullivan*, 216 Wis. 2d 768, 780-81, 576 N.W.2d 30 (1998); *State v. Payano*, 2009 WI 86, ¶¶ 40-41, 320 Wis. 2d 348,

768 N.W.2d 832 (if there is reasonable basis for trial court's ruling, appellate court should affirm).

Therefore, the question on review is not whether this court would have allowed admission of the evidence; but whether the circuit court examined relevant facts, applied a proper standard of law, and used a demonstrative rational process to reach a conclusion that a reasonable judge would reach. *State v. Hurley*, 2015 WI 35, ¶ 28, 361 Wis. 2d 529, 861 N.W.2d 174; *State v. Veach*, 2002 WI 110, ¶ 55, 255 Wis. 2d 390, 648 N.W.2d 447.

In short, the circuit court does not erroneously exercise its discretion in admitting other acts evidence unless the circuit court's decision was a decision that no reasonable judge could make. *Payano*, 320 Wis. 2d 348, ¶ 52; *Hurley*, 361 Wis. 2d 529, ¶ 54.

2. The State, as the proponent of the other acts evidence, needed to show the evidence's purpose and relevance by a preponderance of the evidence.

The party seeking to admit the other acts evidence bears the burden of establishing that *Sullivan's* first two prongs—proper purpose and relevance—are met by a preponderance of the evidence. *State v. Marinez*, 2011 WI 12, ¶ 19, 331 Wis. 2d 568, 797 N.W.2d 399. Once the proponent establishes the first two prongs, however, the burden shifts to the opponent to show that the probative value of the evidence is substantially outweighed by the risk or danger of unfair prejudice. *Id.*

a. Purpose.

First, the evidence must be offered for an admissible purpose under Wis. Stat. § 904.04(2), such as to establish motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident. *Sullivan*, 216 Wis. 2d at 772. This statutory list, however, is illustrative, not exhaustive. *State v. Edmunds*, 229 Wis. 2d 67, 79, 598 N.W.2d 290 (Ct. App. 1999). *See also Payano*, 320 Wis. 2d 348, ¶ 63 n.12 (purposes are not mutually exclusive, and same evidence may fall into multiple exceptions).

The statute, therefore, mandates the exclusion of other crimes evidence in only one instance: when it is offered to prove the propensity of the defendant to commit similar crimes. *Hurley*, 361 Wis. 2d 529, ¶ 56 (other-acts evidence offered for purpose other than prohibited propensity purpose admissible if relevant to permissible purpose and not unfairly prejudicial).

In other words, the statute serves dual purposes: it acts as an exclusionary rule precluding the use of a person's character as circumstantial evidence of conduct; but it also acts as an inclusionary rule allowing other acts evidence to be used to prove something other than the forbidden propensity inference. *Payano*, 320 Wis. 2d 348, ¶ 63.

As long as the proponent identifies one or more proper purposes for the evidence that is not related to the forbidden character inference, the first step is satisfied. *Payano*, 320 Wis. 2d 348, ¶ 63. Consequently, this first step is hardly demanding, and does not require that courts pigeonhole (or more accurately, jam) the other acts into one of the categories. *Id.* ¶ 63 & n.12.

Identifying proper purposes is largely meant to develop the framework for the relevancy determination; but the purposes for which other acts evidence may be admitted are almost infinite, with the prohibition against propensity inference being the main limiting factor. *Marinez*, 331 Wis. 2d 568, ¶ 25.

b. Relevance.

Second, the evidence must be relevant, which is a two-pronged determination: first, the evidence must be of consequence to the determination of the action; and second, it must have a tendency to make the consequential fact or proposition more probable or less probable than it would be without the evidence. *Sullivan*, 216 Wis. 2d at 772.

However, because other acts evidence is inherently relevant to prove character and therefore a propensity to behave accordingly, the real issue is whether the other act is relevant to anything else. *Payano*, 320 Wis. 2d 348, ¶ 67 (proponent must convince judge that evidence has relevance apart from its tendency to shed light on defendant's character).

Thus, in order for evidence to be relevant, the following questions must be answered affirmatively: (1) is the proposition for which the evidence is offered "of consequence" to the determination of the action; and (2) does the evidence have probative value when offered for that purpose? *Payano*, 320 Wis. 2d 348, ¶ 68.

In answering the first question, the circuit court must focus on the pleadings and contested issues in the case. *Id.* ¶ 69. In a criminal case, the State must prove all elements, even ones the defendant does not dispute. *Id.* ¶ 69 n.15. In

answering the second question, the circuit court must make a common sense determination based less on legal precedent than life experiences. *Id.* ¶ 70.

Moreover, *Sullivan* relevance means having any tendency to make the consequential fact more or less probable than without the evidence. *Id.* ¶ 68. *See also State v. Richardson*, 210 Wis. 2d 694, 707, 563 N.W.2d 899 (1997) (because of broad definition of relevancy, strong presumption of relevance exists).

Thus, although *Sullivan's* second prong is significantly more demanding than the first prong, it still does not present a high hurdle for the proponent, because the expansive definition of relevancy in Wis. Stat. § 904.01 is the true cornerstone of the Wisconsin Rules of Evidence. *Marinez*, 331 Wis. 2d 568, ¶ 33.

3. The burden then shifted to Calderon, the opponent of the evidence, to show unfair prejudice.

Third, the probative value of the other acts evidence must not be substantially outweighed by the considerations set forth in Wis. Stat. § 904.03, which are: the danger of unfair prejudice; confusion of the issues or misleading the jury; or undue delay, waste of time or needless presentation of cumulative evidence. *Sullivan*, 216 Wis. 2d at 772-73. The opponent of the evidence bears the burden of showing unfair prejudice. *Marinez*, 331 Wis. 2d 568, ¶ 19.

The appropriate inquiry is not whether the other acts evidence is prejudicial, but whether it is unfairly prejudicial. *State v. Gray*, 225 Wis. 2d 39, 64, 590 N.W.2d 918 (1999). The term "substantially outweighed" indicates that if the

probative value of the evidence is close or equal to its unfair prejudicial effect, the evidence must be admitted. *Payano*, 320 Wis. 2d 348, ¶ 80.

The evidence's probative value largely turns on the relevancy analysis from *Sullivan's* second prong. *Payano*, 320 Wis. 2d 348, ¶ 81. Evidence that is highly relevant has great probative value, whereas evidence that is only slightly relevant has low probative value. *Id.* The main consideration in assessing probative value of other acts evidence is the extent to which the proffered proposition is in substantial dispute—how badly needed is the evidence? *Id.*

In contrast, the evidence's prejudicial effect does not turn on whether the evidence has any tendency to harm the opposing party's case; but whether the evidence tends to influence the outcome of the case by improper means. *Payano*, 320 Wis. 2d 348, ¶ 89. As *Sullivan* makes clear:

> Unfair prejudice results when the proffered evidence has a tendency to influence the outcome by improper means or if it appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish or otherwise causes a jury to base its decision on something other than the established propositions in the case.

Sullivan, 216 Wis. 2d at 789-90.

Therefore, the determination of unfair prejudice must be made with great care because "'[n]early all evidence operates to the prejudice of the party against whom it is offered.... The test is whether the resulting prejudice of relevant evidence is *fair or unfair.*'" *Payano*, 320 Wis. 2d 348, ¶ 88 (quoted source omitted).

Further, the circuit court's limitations on the testimony and arguments—particularly cautionary jury

instructions—can go a "long way" in limiting or mitigating the unfair prejudice that may result from the admission of other acts evidence. *Id.* ¶ 99.

B. The circuit court properly exercised its discretion in admitting the other acts evidence for the purposes of establishing the shooter's identity and rebutting Calderon's contention that he did not know the gun was in the vehicle.

Calderon does not dispute that identity and absence of knowledge—the State's two proffered purposes (6:3; 44:3-4 [R-Ap. 103-104])—are proper purposes for other acts evidence.[8] And the law is clear that those purposes are proper. *Sullivan*, 216 Wis. 2d at 772 (proper purposes include identity and absence of knowledge or mistake).

Instead, Calderon cites a pre-*Sullivan* case, *State v. Johnson*, 184 Wis. 2d 324, 336, 516 N.W.2d 463 (Ct. App. 1994), in arguing that the general policy of the other acts statute is "one of exclusion" (Calderon's brief at 6). Similarly, Calderon cites *Whitty v. State*, 34 Wis. 2d 278, 294, 149 N.W.2d 557 (1967), another pre-*Sullivan* case, in arguing that the standards of relevancy for admitting other acts evidence "should be stricter" when used to prove identity (Calderon's brief at 7).

But post-*Sullivan* cases, such as *Hurley* and *Payano*, make clear that the statute is actually inclusionary and mandates exclusion in only one instance—when the evidence is used to prove the forbidden propensity inference. *Hurley*,

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[8]Calderon disputes the relevance of the evidence (Calderon's brief at 7-11), as will be discussed below, but he does not appear to dispute that the proffered purposes were proper.

361 Wis. 2d 529, ¶ 56; *Payano*, 320 Wis. 2d 348, ¶ 63. Accordingly, this court should reject Calderon's arguments outright, because those arguments rely on pre-*Sullivan* cases which have now been substantially changed post-*Sullivan*.

Here, the State—as proponent of the evidence—identified two proper purposes for the evidence that were not related to the forbidden character inference, thereby easily satisfying the first step in the *Sullivan* analysis. *Payano*, 320 Wis. 2d 348, ¶ 63 & n.12 (first step is hardly demanding). *See also Marinez*, 331 Wis. 2d 568, ¶ 25 (identifying proper purposes is largely meant to develop framework for relevancy determination, and prohibition against propensity inference is main limiting factor).

The circuit court properly exercised its discretion in finding that both purposes were proper (44:4 [R-Ap. 104]). Although the court found that knowledge and absence of mistake were perhaps more acceptable purposes than identity in this case, the court found that both purposes were proper (*id.*).

This court should uphold the circuit court's decision as a proper exercise of discretion, because it was reasonable. *Payano*, 320 Wis. 2d 348, ¶¶ 40-41 (if there is reasonable basis for trial court's ruling, appellate court should affirm); *Hurley*, 361 Wis. 2d 529, ¶ 54 (circuit court does not erroneously exercise discretion unless no reasonable judge could make that decision).

C. The circuit court properly exercised its discretion in finding that the other acts evidence was relevant to establish that Calderon was the shooter, and to rebut Calderon's contention that he did not know the gun was in the vehicle.

1. Both the shooter's identity and Calderon's possession of the gun inside the vehicle were material facts of consequence.

In assessing relevance, the circuit court first needed to determine whether the other acts evidence—that is, the victim's description of seeing Calderon with the gun previously—was a fact "of consequence" to the action. *Sullivan*, 216 Wis. 2d at 772; *Payano*, 320 Wis. 2d 348, ¶ 68. In answering this question, the court needed to assess the pleadings and the contested issues in the case. *Payano*, 320 Wis. 2d 348, ¶ 69.

Calderon does not dispute that both facts—the shooter's identity and his knowledge or possession of the gun inside the vehicle—were material facts of consequence at trial. Indeed, Calderon's whole defense to the reckless endangerment charge was that he was not the shooter and that he was not driving the vehicle at the time of the shooting (48:28-31). Similarly, Calderon's original opposition to the *Sullivan* motion (44:4 [R-Ap. 104]) and his defense at trial (48:28-31) were both predicated on Calderon's contention that he did not know the firearm was inside the vehicle, because the vehicle belonged to his sister and the gun was registered to someone else (47:43-45).

Therefore, the circuit court properly found that those facts were facts of consequence, because the "whole issue" in the case was whether Calderon "shot the gun and was he

found in the car with the gun shortly after?" (44:4 [R-Ap. 104]). Again, this court should affirm the circuit court's determination, because it was reasonable for the circuit court to conclude that those facts were consequential. *Payano*, 320 Wis. 2d 348, ¶¶ 40-41; *Hurley*, 361 Wis. 2d 529, ¶ 54.

2. The other acts evidence that the victim had seen Calderon with the same gun previously was highly probative to show that Calderon was the shooter and to show that Calderon had possession of the gun inside the vehicle.

Calderon's main argument is that the other acts evidence was not relevant to the facts of consequence, because the evidence was not probative of those facts (Calderon's brief at 8-11). Specifically, Calderon asserts that it was "conjecture" that the gun found in his car was the same gun that the victim described, because the details of the gun the victim described were not sufficiently distinctive or similar to the gun that was actually found, and therefore failed to show his distinctive "imprint" (*id.*). But this argument is wrong on both the law and the facts.

On the law, Calderon misconstrues *Sullivan's* relevance standard, because the State did not need to prove that the gun the victim described was the same gun the police found, in order for the other acts to be admissible. Rather, to show relevance, the State only had to show that the other act (*i.e.,* the victim seeing Calderon with a gun previously) had any tendency to make the consequential facts (*i.e.,* that Calderon was the shooter and knew the gun was in the vehicle or had possession of the gun) more

probable than those facts would be without the evidence. *Sullivan*, 216 Wis. 2d at 772; *Payano*, 320 Wis. 2d 348, ¶ 67.

In other words, the State only needed to show that the evidence had some probative value in showing that Calderon was the shooter and knew the gun was in the vehicle or had control over it. *Payano*, 320 Wis. 2d 348, ¶¶ 67, 68 (proponent must convince judge that evidence has relevance apart from its tendency to shed light on defendant's character). Under this broad "any tendency" test of relevancy, the State easily met its burden. *Richardson*, 210 Wis. 2d at 707 (strong presumption of relevance exists).

In short, under the law, the State did not need to show that the gun was identical, or sufficiently similar to show Calderon's "imprint," in order for the gun to be relevant to Calderon's identity as the shooter or to be relevant his knowledge or possession of the gun inside the vehicle.[9] Rather, Calderon's previous possession of a similar or same gun was relevant, because his previous possession of the gun had a tendency to make his current possession of the gun in the vehicle more probable than it was without the evidence of his previous possession. *Sullivan*, 216 Wis. 2d at 772; *Payano*, 320 Wis. 2d 348, ¶ 67. Similarly, Calderon's previous possession of a similar or same gun had a tendency to make his identity as the shooter more probable than without the evidence. *Id.*

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[9]Even in *modus operandi* or "imprint" cases, the State only needs to show the acts are similar, not identical. *See, e.g., Hurley*, 361 Wis. 2d 529, ¶¶ 64-69 (strong similarities ensure high level of probativeness and outweigh any differences that might exist). But here, the State was not offering the other acts evidence to show Calderon's *modus operandi* or "imprint" in a series of crimes, but to show Calderon had knowledge or control over the gun in the vehicle (for the possession charge), and to show Calderon's identity as the shooter (for the reckless endangerment charge).

Further, Calderon's argument—that the victim's description of the gun was vague and did not contain sufficient detail to show a distinctive "imprint" (Calderon's brief at 8-9)—is as wrong on the facts as it is on the law. At trial, the victim recanted her statement to Officer Brock about seeing Calderon with a silver, revolving barrel gun with a black handle (45:94, 98-99). But Officer Brock's testimony was clear that the victim told him she had seen Calderon with this very specific kind of gun, less than one month prior to the shooting incident (47:37-43).

For example, Officer Brock said the victim described the gun as being "[s]ilver with a black handle" (47:37-38). Further, after being shown pictures of different kinds of guns, the victim identified Calderon's gun as a revolver with a bulky cylinder on the side (47:38-39, 42-43). Officer Brock was clear that the gun found in Calderon's car matched the description of the gun the victim had described to him earlier (47:40-41).

Given these facts, the circuit court properly exercised its discretion when it found that the other acts evidence was admissible in proving Calderon's gun possession, because its probative value was "very high" (44:5 [R-Ap. 105]). As the court explained, "certainly whether or not he had that gun before does potentially go toward" the felon in possession charge, "as means of him knowing that that gun was there. It goes to prove that specific fact," and was "relevant even if it doesn't go to whether he actually fired the weapon" (*id.*).

The court later reiterated that it was proper for the victim to testify as to the other acts that "this was the handgun that looked like the one that was found in the car" (44:6 [R-Ap. 106]). This was not a decision that no reasonable judge could reach on the facts of the case, but

was a common sense determination based less on legal precedent than life experiences. *Payano*, 320 Wis. 2d 348, ¶ 70.

Finally, Calderon argues that the fact that the victim had seen him with a gun previously was not sufficiently probative of his identity or his knowledge of the gun in the vehicle (Calderon's brief at 9-10). Specifically, he contends that the testimony did not reveal how, or in what manner, he possessed the gun previously, such as holding it or tucking it in his waistband, and the prior incident did not involve an automobile (Calderon's brief at 9-10). Calderon therefore concludes that the evidence was not probative of his possession of the gun inside the vehicle, because it did not prove where the gun was stored and did not prove Calderon's knowledge of the gun's hidden location (*id.* at 8-10).

But again, such similarities are not required for the evidence to be probative, given the facts of this case. Probativeness of the evidence is not overly legalistic, but is a common sense determination. *Payano*, 320 Wis. 2d 348, ¶ 70.

The State was not required to show <u>how</u> Calderon possessed the gun previously in order for the other acts evidence to be relevant to the charged act that he possessed the gun at the time of the crime. Rather, the State only needed to show that the other acts evidence that he previously possessed the gun was <u>probative</u> of the charged act that he possessed the gun at the time of the crime (*i.e.,* that the other acts evidence had any tendency to show the charged act was more probable than it would be without the other acts evidence).

And in order to make this showing, the State was not necessarily required to show that Calderon had knowledge of the gun's exact location or where it was stored within the vehicle. In order to show possession, the State was only required to show that Calderon had control over the vehicle, and that he had the intent to exercise control over the item inside the vehicle (13:4). The evidence of Calderon's prior control and possession over the gun was highly probative to show Calderon's possession or control over the gun at the time in question, and to rebut his contention that he had no knowledge of the weapon inside his sister's car.

In short, although *Sullivan's* relevance prong is significantly more demanding than the purpose prong, it still does not present a high hurdle for the proponent, because the expansive definition of relevancy in Wis. Stat. § 904.01 is the true cornerstone of the Wisconsin Rules of Evidence. *Marinez*, 331 Wis. 2d 568, ¶ 33. The circuit court properly found that the State, as the proponent of the evidence, met its burden in showing the relevance of the other acts evidence, and this court should affirm that reasonable exercise of discretion. *Payano*, 320 Wis. 2d 348, ¶¶ 40-41; *Hurley*, 361 Wis. 2d 529, ¶ 54.

D. The circuit court properly exercised its discretion in finding that Calderon had not met his burden in showing that the probative value of the other acts evidence was substantially outweighed by the danger of unfair prejudice.

Because the State had established permissible purposes for the other acts evidence, and had established the evidence's relevance and probative value, the burden of persuasion therefore shifted to Calderon to prove that the probative value of the evidence was substantially

outweighed by the danger of unfair prejudice. *Marinez*, 331 Wis. 2d 568, ¶ 41. And as the circuit court properly found, Calderon did not meet his burden (44:5 [R-Ap. 105]).

As the circuit court explained, the probative value of the evidence was "very high" and would not cause undue delay or confuse or mislead the jury (44:5 [R-Ap. 105]). More importantly, the court found that Calderon had not shown that the probative value of the evidence was substantially outweighed by the danger of unfair prejudice (*id.*).

Calderon argues that the other acts evidence was prejudicial because it allowed the jury to conclude that he was "an armed and dangerous man" (Calderon's brief at 11). Again, however, this argument is wrong on both the law and the facts.

On the law, the evidence was not inadmissible merely because it was prejudicial to Calderon. Nearly all evidence is prejudicial to the party against whom it is offered. *Payano*, 320 Wis. 2d 348, ¶ 88. The appropriate inquiry, which must be made with "great care," is whether the resulting prejudice is fair or unfair—that is, whether the evidence tends to influence the outcome of the case by improper means. *Id.* ¶¶ 88-89. Moreover, the term "substantially outweighed" indicates that if the probative value of the evidence is close or equal to its unfair prejudicial effect, the evidence must be admitted. *Id.* ¶ 80. Here, even if the evidence prejudiced Calderon, it did not substantially prejudice him, so it was properly admitted. *Id.*

On the facts, the evidence was not unfairly prejudicial to Calderon, because it did not have a tendency to influence the outcome by improper means or provoke the jury's instinct to punish Calderon or base its decision on something

other than the established propositions in the case. *Sullivan*, 216 Wis. 2d at 789-90. Based on the stipulation (11; 44:8-13 [R-Ap. 108-113]), the jury already knew that Calderon was a felon, and based on the charges (2:1-3), knew he was being charged with gun possession and reckless endangerment because of a drive-by shooting.

More importantly, from the established propositions in the case, the jury also already knew the following about Calderon:

- that Calderon had threatened the victim earlier by stating he was going to "kill her and air out her house" (45:105-106);
- that the victim's father believed she needed to get out of that house based upon Calderon's threats because "it was becoming a volatile situation real quick" (46:14), and was afraid "[t]hat the threats that were made prior to that point were actually being carried through" (46:16);
- that the victim's close friend believed the victim was "freaked out for her life" because of a "situation" with "Luigi," or Calderon, and wanted to be picked up and taken over to the friend's house where she would be more safe (46:33-37; 47:39); and
- that the officer who responded to the call for shots fired believed that Calderon's vehicle was involved in the shooting, called for backup, and effectuated a "high risk" traffic stop (46:60-63).

In short, the jury already knew—from properly established propositions at trial—that the victim, her father, her friends, and the police all considered Calderon to be dangerous and believed he was armed, even without the jury knowing about the other acts evidence of Calderon's previous

gun possession. Thus, the other acts evidence did not influence the jury by improper means, because the evidence of the charged crimes already established those propositions at trial. *Sullivan*, 216 Wis. 2d at 789-90.

Indeed, the jury heard instructions that it was not supposed to be swayed by sympathy, prejudice, or passion (13:12), thereby mitigating the risk that the jury would convict Calderon based on improper means. *Payano*, 320 Wis. 2d 348, ¶ 99 (circuit court's limitations on other acts testimony, particularly cautionary jury instructions, go a "long way" in limiting or mitigating prejudice).

Calderon argues that, on the facts, the other acts evidence was not necessary to, or "badly needed" for, the State's case, because the State already had evidence that Calderon could reach, and therefore had control over, the weapon found in his vehicle (Calderon's brief at 9). *Payano*, 320 Wis. 2d 348, ¶ 81 (main consideration in assessing probative value of other acts evidence is extent to which proffered proposition is in substantial dispute, or how badly needed is the evidence).

Calderon is correct that the facts at trial already tended to establish that Calderon had possession of the gun in the vehicle. For one thing, Calderon was stopped with a gun in his vehicle about 15 minutes after the shooting, which was only about 20 minutes after Calderon drove by the victim's house in a threatening manner (46:15-16; 47:25-27, 41-42, 68-69). The traffic stop was also only about 20 blocks from the crime scene (46:73; 47:70-71).

For another thing, Calderon was the only occupant and driver of the vehicle (46:63-64), and the hidden fuse panel where the weapon was stored on the driver's side had

been tampered with, was loose, and was easily removed by the officer (46:65-66, 85)—circumstantial evidence from which the jury could infer that Calderon had hidden the gun there.

But the State still needed the evidence of Calderon's prior gun possession in order to rebut Calderon's contention that he did not know the gun was there because it was his sister's car. And the State also still needed the other acts evidence in order to prove Calderon's identity as the shooter. Besides the prior act, there was no other evidence directly tying Calderon to the shooting, because neither Ed (46:17) nor Amanda (46:39-41, 55-56) could tell who the shooter was.

To be sure, there was other circumstantial evidence that Calderon was the shooter. Both Ed (46:22-23) and Amanda (47:25, 27) saw Calderon drive by no more than 10 to 15 minutes before the shooting, and the victim saw Calderon drive by about five minutes before the shooting (47:41-42). Amanda also saw the shooter with a dark hoodie on (47:25-26), and Calderon was arrested only a few minutes later wearing those clothes (46:80).

The jury also heard that Calderon had made threats to the victim earlier that day about shooting her house (45:105-106). And of course, the jury heard that the Ruger revolver found in Calderon's vehicle had five spent casings inside, and ballistics evidence matched the weapon to at least one bullet fired into the house (46:67-72).

But there was no direct evidence that Calderon was actually the shooter, so the State "badly needed" the other acts evidence, because it was the only evidence having the tendency to identify the shooter as Calderon rather than some unknown suspect. *Payano*, 320 Wis. 2d 348, ¶ 81. And

it was also "badly needed" because it was the only evidence rebutting Calderon's defense that he did not know the gun was in the vehicle. *Id.*

In short, this court should affirm the circuit court's determinations that the other acts evidence was highly relevant, and that the probative value of the evidence was not substantially outweighed by the evidence's prejudicial effect. *Payano*, 320 Wis. 2d 348, ¶¶ 88-90. Even if this court may not have admitted the evidence, this is not the test on appeal. *Hurley*, 361 Wis. 2d 529, ¶ 28. The circuit court properly exercised its discretion because it examined relevant facts, applied a proper standard of law, and used a demonstrative rational process to reach a conclusion that a reasonable judge would reach. *Id.*

II. CALDERON'S DUE PROCESS RIGHT TO A FAIR TRIAL WAS NOT VIOLATED BECAUSE NO EVIDENCE OF CALDERON'S GANG INVOLVEMENT WAS ACTUALLY ADMITTED.

Calderon argues that his due process rights were violated because Officers Tracy and Brock insinuated that he was a member of a gang (Calderon's brief at 12-14).[10] As discussed below, however, this argument is not supported by the facts or by the law.

[10]The State agrees with Calderon (Calderon's brief at 13) that this argument was preserved below, based upon Calderon's pre-trial motion *in limine* (7:1; 44:6-8 [R-Ap. 106-108]), and the sidebar at trial (47:51-55 [R-Ap. 114-118]).

A. Calderon's due process argument is not supported by the facts.

1. No evidence of Calderon's gang involvement was actually admitted.

Contrary to Calderon's contention (Calderon's brief at 12-14), there was no actual admission or mention of any evidence of Calderon's gang involvement. Calderon argues that it was "highly likely" that the jury inferred he was a member of gang, and "certainly prejudicial" (*id.* at 13), but the record does not bear out this assertion.

For example, Calderon argues that the jury inferred he was a member of a gang based upon Officer Tracy's testimony that "Luigi" was "also a member of—" (Calderon's brief at 13-14). But both defense counsel (47:27) and the prosecutor (47:52-53 [R-Ap. 115-116]) quickly cut off the testimony before Officer Tracy could continue. The court also immediately struck Officer Tracy's answer (47:27), and later instructed the jury not to consider the stricken testimony (13:8; 48:12).

Further, as the prosecutor also noted at the sidebar, "nothing came out that was the subject of the motion in limine," and "right now no one has made mention of the defendant's gang affiliation" (47:53 [R-Ap. 116]). The circuit court agreed, explaining that "really this record does not spell out anything for the jurors," and the court had already stricken the answer and instructed the jury to disregard it (47:54 [R-Ap. 117]). The court concluded that the quick reaction to cut off the testimony was "good" and the comment did not rise to the level of mistrial or prejudice Calderon in any way (47:54 [R-Ap. 117]).

Thus, the record is clear that there was absolutely no mention of Calderon's gang affiliation, in compliance with the court's ruling on the motion *in limine*.

2. The jury would not necessarily make an inference that Calderon was in a gang based upon the testimony of Officers Tracy and Brock.

Moreover, contrary to Calderon's assertion (Calderon's brief at 13), the jury did not necessarily infer from the "member of" comment that Calderon was a "member of" a gang. The jury could have just as easily inferred that Calderon was "a member of the 4-H Club or Lion's Club," because no other details were mentioned from which the jury would necessarily draw the nefarious or sinister inference (47:53 [R-Ap. 116]) that Calderon espouses.

Similarly, Calderon argues that it was "highly likely" that the jury inferred he was a member of a gang based upon Officer Brock's testimony that the police knew his nickname and that he "had attracted police attention many times in the past," necessarily leading the jury to the impermissible propensity inference that Calderon was "at least a troublemaker" (Calderon's brief at 14). But again, Calderon's assertions are not supported by the evidence at trial.

First and foremost, Officer Brock did not actually testify that Calderon had attracted police attention "many times in the past." Rather, Officer Brock actually testified that he assisted in responding to the victim's call because the victim had mentioned "a nickname of a person that we are familiar with and have dealt with in the past" (47:35).

But "familiar with" and "dealt with" are not synonymous with attracting police attention "many times," and Officer Brock's mere mention that he had previously "dealt with" and was "familiar with" Calderon did not necessarily imply anything sinister (47:53 [R-Ap. 116]). Indeed, Officer Brock's comment was made in passing, and was not dwelt upon (*id.*). There were no details of the previous interaction or interactions, and the mere fact that an officer had seen Calderon before in the community previously did not automatically mean that Calderon was a nefarious individual (*id.*).

Moreover, in Calderon's motion *in limine*, Calderon did not actually request to exclude any reference to the police's past contacts with Calderon (7:1; 44:6-8 [R-Ap. 106-108]), nor did the court's ruling prohibit reference to whether officers had ever seen Calderon before (47:53 [R-Ap. 116]). Rather, Calderon only asked to exclude any reference to (7:1; 44:6-8 [R-Ap. 106-108])—and the court's ruling only specifically prohibited mention of (47:53 [R-Ap. 116])—Calderon's gang affiliation, nothing else.

Finally, the record does not support Calderon's assertion that Officer Brock's knowledge of Calderon's nickname "Luigi" necessarily meant that the jury would infer that Calderon was part of a gang (Calderon's brief at 13). Before Officer Brock even testified about Calderon's nickname (47:3-36), both the victim's father, Ed (46:11-15, 22-23), and the victim's friend, Amanda (46:33-39), had already testified that Calderon's nickname was "Luigi."[11]

[11]The victim referred to Calderon as "Luis" but not "Luigi" (45:89-100).

In short, the evidence at trial simply does not bear out Calderon's assertion that the jury necessarily inferred that Calderon was a member of a gang, based upon the testimony of Officers Tracy and Brock.

B. Calderon's due process argument is not supported by the law.

Further, the law does not support Calderon's argument that he was prejudiced by, or that his due process rights were violated by, the testimony of Officers Tracy and Brock.

1. *Burton* is distinguishable.

Calderon cites *State v. Burton*, 2007 WI App 237, 306 Wis. 2d 403, 743 N.W.2d 152, in arguing that the circuit court failed to assess the "cumulative" level of prejudice (Calderon's brief at 13-14). But *Burton* does not have any application to Calderon's case, nor does *Burton* support Calderon's due process argument.

In *Burton*, this court reversed the defendant's conviction because the State's expert witness had extensively testified about how gang culture and gang involvement can change witnesses' statements, and about how gang culture and gangs permeated the witnesses' neighborhood, yet there was no basis to conclude that the defendant was part of a gang or even that his crimes were gang related. *Burton*, 306 Wis. 2d 403, ¶¶ 1, 7-9. This court found that such testimony was inadmissible because it was irrelevant and highly prejudicial. *Id.* ¶ 13.

In so holding, this court explained that the circuit court can, in its discretion, admit evidence of a defendant's

gang affiliation in order to show bias or motive. *Burton*, 306 Wis. 2d 403, ¶¶ 13-17. But in *Burton*, this court found that the circuit court had engaged in faulty logic and had improperly extended relevant case law in concluding that the evidence was admissible in the defendant's case. *Id.* ¶¶ 18-19.

In *Burton*, not only was there no evidence that the defendant was actually a member of a gang or even that he subscribed to gang culture, but the State's entire line of questioning was also designed to support the prosecution's theory that the defendant's motive was gang-related. *Burton*, 306 Wis. 2d 403, ¶¶ 18-19. Accordingly, this court ruled that the circuit court improperly exercised its discretion in admitting the gang-related evidence, and that the error was not harmless because it pervaded the State's entire case. *Id.* ¶¶ 19-21.

Burton, however, is entirely distinguishable from Calderon's case, for two reasons. First, unlike in *Burton*, the circuit court here actually ruled to <u>exclude</u> the evidence (44:6-8 [R-Ap. 106-108]; 47:51-55 [R-Ap. 114-118]), not to admit it. *Compare Burton*, 306 Wis. 2d 403, ¶¶ 7-9. Here, no one is disputing that the circuit court properly exercised its discretion by excluding any reference to Calderon's gang involvement. Thus, *Burton's* entire discussion—of whether the circuit court had properly exercised its discretion in admitting the evidence—has no relevance because the evidence was actually excluded in Calderon's case.

Second, unlike in *Burton*, the officers here did not testify extensively about gang culture, gang violence, or gang involvement. Rather, as discussed above, the comment that Calderon was "a member of—" was made in passing, quickly dealt with, and not emphasized, such that it did not "spell

out anything for the jurors" (47:53-54 [R-Ap. 116-117]). Indeed, unlike in *Burton*, the prosecutor here did not even want to elicit any testimony about Calderon's gang involvement, because the State's theory of the case was that Calderon's crimes were motivated by domestic violence, not any kind of gang retaliation (44:7-8 [R-Ap. 107-108]).

2. *Long* is controlling.

To the extent that the jury inferred anything negative about Calderon's prior police contacts, however, it was much more likely that the jury inferred that the police knew Calderon because Calderon had engaged in previous domestic violence against the victim, or because Calderon was a felon, not because the jury inferred that police knew Calderon to be a member of a gang.

For example, the jury already knew from the charges that Calderon was a repeat offender of domestic abuse and recklessly endangering safety (2:1-3). And the jury also knew from the trial testimony that Calderon and the victim had previously been romantically involved and had a son together, but that the relationship was over and Calderon had threatened the victim right before the shooting (45:89-92, 105-106; 46:33-36). And of course, the jury knew from the stipulation that Calderon was a felon (11; 44:8-13 [R-Ap. 108-113]). From these facts, the jury could obviously (and properly) infer that Calderon had had prior police contacts.

Moreover, to the extent that the jury inferred that the police knew Calderon to be a domestic violence perpetrator, such an inference was permissible, because that inference provided a motive for the victim to testify falsely at trial. *See, e.g., State v. Long*, 2002 WI App 114, ¶¶ 1, 17-18, 255

Wis. 2d 729, 647 N.W.2d 884 (evidence of defendant's gang affiliation admissible to show possible bias of witnesses in shaping their testimony, including motive to falsely testify).[12]

As the State noted in its closing argument, the case was "a domestic violence case" (48:18), which explained why the victim was scared of Calderon and testified at trial that she could not remember what she told police (48:23). In rebuttal, the State similarly argued that the victim "misremember[ed] things," either out of love for, or out of fear of, Calderon (48:34). As the prosecutor argued, the victim was uncooperative and did not want to testify against Calderon at trial because she was "terrified of him," adding that "[d]omestic violence cases are not clean. They're not nice. They are sloppy" (48:37).

For that reason, the *Long* case is instructive and controlling here. As in *Long*, the prosecutor here did not belabor the issue of Calderon's prior police contacts, and only spoke in general terms that the victim had mentioned "Luigi" as someone whom they were "familiar with and ha[d] dealt with in the past" (47:35), without providing any further details. *Long*, 255 Wis. 2d 729, ¶ 23. Nor did the prior police contacts play any role—let alone a prominent one—in either the State's opening statement or closing argument. *Long*, 255 Wis. 2d 729, ¶ 23. In its opening statement, the State only referenced once that Calderon was a convicted

[12]That the victim was a State witness does not alter the analysis or conclusion. *Long*, 255 Wis. 2d 729, ¶ 22 (admission of evidence of gang affiliation for impeachment purposes not altered by fact that witnesses were called as State witnesses). *See also* Wis. Stat. § 906.07 (witness credibility can be attacked by anyone, including party calling witness).

felon (45:84), and in its closing argument, did not reference Calderon's prior police contacts at all.

Thus, as in *Long*, this court should not be convinced that the evidence of Calderon's police contacts, or any possible suggestion of his gang membership, "so permeated the trial as to create a risk of unfair prejudice or confusion of the issues." *Long*, 255 Wis. 2d 729, ¶ 23. Rather, as the circuit court concluded here, this court should also conclude that the isolated comments did not violate the court's pre-trial order, nor did the comments rise to the level of mistrial or prejudice Calderon in any way (47:54 [R-Ap. 117]).

In short, Calderon's case is much more like *Long* than *Burton*, because the evidence about which Calderon complains was brief, was not emphasized, and did not lead to the inference that Calderon propounds. To the extent any inferences were made, however, the evidence was properly admissible to show the victim's motive to falsely testify. *Long*, 255 Wis. 2d 729, ¶¶ 17-18.

C. Any inference that Calderon was in a gang was harmless error, because it is clear beyond a reasonable doubt that the jury still would have convicted Calderon absent the error.

As already discussed, there is nothing in the record to support Calderon's assertion that the jury necessarily inferred that he committed the crimes because he was a bad person or a member of a gang. But even if the jury drew those impermissible propensity inferences, the error was harmless.

Contrary to Calderon's assertion (Calderon's brief at 14-15), it is clear beyond a reasonable doubt that a rational

jury would still have found Calderon guilty absent the error. *State v. Harvey*, 2002 WI 93, ¶¶ 46-47, 254 Wis. 2d 442, 647 N.W.2d 189. This court need only look to the totality and strength of the credible evidence supporting the guilty verdicts to reach that conclusion. *See, e.g., State v. Ziebart,* 2003 WI App 258, ¶ 26, 268 Wis. 2d 468, 673 N.W.2d 369; *State v. Hunt*, 2003 WI 81, ¶¶ 77-82, 263 Wis. 2d 1, 666 N.W.2d 771.

As already discussed, even without the reference to Calderon's prior police contacts, and even without any inference that Calderon was in a gang, the jury already heard evidence:

- that Calderon had threatened the victim earlier that day (45:105-106);
- that it was a volatile situation (46:14-16);
- that Amanda was going to pick up the victim to stay at Amanda's house because the victim feared for her life (46:33-37; 47:39);
- that both Ed and Amanda saw Calderon drive by not more than 10 to 15 minutes before the shooting (46:22-23, 43-44, 47:25-30, 41-42);
- that Calderon was stopped with a gun in his vehicle about 15 minutes after the shots were fired, wearing the same clothes that Amanda described (46:43-44, 63-66, 80; 47:25-26); and
- that the gun found inside Calderon's vehicle had five spent casings inside, and ballistics matched the weapon to at least one bullet fired into the house (46:67-72).

In short, this court should affirm Calderon's conviction, because sufficient untainted evidence existed to convict Calderon, absent any error or improper inference that might have existed. *See, e.g., Hunt*, 263 Wis. 2d 1, ¶¶ 77-82.

CONCLUSION

For the reasons set forth, the State respectfully requests that this court AFFIRM the judgment of conviction.

Dated this 2nd day of September, 2015.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 10,766 words.

_____
Sarah K. Larson
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify thatI have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 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.

Dated this 2nd day of September, 2015.

_____
Sarah K. Larson
Assistant Attorney General

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, JR.

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING A POSTCONVICTION MOTION FOR SENTENCE MODIFICATION, ENTERED IN THE CIRCUIT COURT FOR WAUKESHA COUNTY, THE HONORABLE MICHAEL O. BOHREN, PRESIDING

SUPPLEMENTAL APPENDIX OF PLAINTIFF-RESPONDENT

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INDEX TO SUPPLEMENTAL APPENDIX

APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is a supplemental appendix that complies with the content requirements of Wis. Stat. § (Rule) 809.19(2)(a); that is, the record documents contained in the respondent's supplemental appendix fall into one of the categories specified in sub. (2)(a).

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.

Dated this 2nd day of September, 2015.

_____

Sarah K. Larson
Assistant Attorney General

CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § (RULE) 809.19(13)

I hereby certify that I have submitted an electronic copy of this appendix, which complies with the requirements of Wis. Stat. § (Rule) 809.19(13).

I further certify that this electronic appendix is identical in content to the printed form of the appendix filed as of this date.

A copy of this certificate has been served with the paper copies of this appendix filed with the court and served on all opposing parties.

Dated this 2nd day of September, 2015.

_____
Sarah K. Larson
Assistant Attorney General