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STATE OF WISCONSIN
COURT OF APPEALS
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

REPLY BRIEF OF
DEFENDANT-APPELLANT

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ARGUMENT

I. The State's brief wrongly distinguishes between pre *Sullivan* and post *Sullivan* cases

The State places a good deal of emphasis on the defendant-appellant's apparent failure to distinguish between pre *Sullivan* and post *Sullivan* cases. (See State's Brief at 16, 20-21) This is a flawed analysis.

Both the pre *Sullivan* cases and post *Sullivan* cases forbid the admission of evidence to show that the person committed a crime because of a character propensity. Both sets of cases acknowledge that some "other acts" evidence can be admitted if used to prove something other than a defendant's character.

The "policy of exclusion" phrase that was cited in the Mr. Calderon's brief only refers to the character propensity inference. It is well established, and Mr. Calderon does not dispute, that some "other acts" evidence can be admitted by the trial court under some circumstances. Mr. Calderon clearly refers to the three-step analysis articulated in *State v. Sullivan*, which remains the law in Wisconsin at this time.

The State also argues that Mr. Calderon's brief is in error for arguing that the standards of relevancy should be stricter when used to prove identity because the cite to *State v. Whitty* is a pre *Sullivan* case. (See State's brief at 20-21).

The State has overlooked the fact that the *Payano* court quotes the same cite to *Whitty* with approval at ¶ 94. This is, of course, a post-*Sullivan* case. It is clear that this language has not been overturned even though *Payano* is a post *Sullivan* case.

II. The State misconstrues the probative value analysis required by *Sullivan*

A. The low probative value of the prior act of gun possession fails to be relevant

The State correctly summarizes Mr. Calderon's position when it stated that his main argument against the other acts evidence was that it was not probative. (State's brief at 23)

However, the State misconstrues the details. The thrust of the argument was that the vague gun description undermines probative value. Because probative value needs to be assessed during both the second and third steps of *Sullivan*, the vague description is problematic both for relevance and for the balancing test of probity with unfair prejudice.

The State is correct that the prosecutor did not need to prove that the gun described by the victim was, in fact, the same gun that was found in the automobile at the time of Mr. Calderon's arrest. (State's brief at 23) However, this is not a correct summary of Mr. Calderon's position.

As the State pointed out, two issues need to be asked when determining relevance. The first is whether the evidence is of consequence to the determination of the action. Mr. Calderon does not challenge that question. The second is whether the evidence has probative value when offered for an acceptable purpose. (*State v. Payano*, 320 Wis. 2d 348, ¶ 68 and State's brief at 17) This is Mr. Calderon's main challenge.

The vague gun description has low probative value. Furthermore, the standards of relevancy should be stricter when the evidence is used to prove identity or the doing of

the act charged. In *Whitty v. State*, 34 Wis. 2d 278, 294, 149 N.W.2d 557, the Court stated:

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

The trial court, in allowing evidence of the prior alleged act of gun possession, failed to use this stricter standard. (Calderon's brief at 11) Simply put, the degree of probity of this other acts evidence is too low to be relevant.

As the State concedes that one of the purposes for introducing the evidence of prior gun possession was for the purpose of the doing of the act charged in Count 2 of the information, this stricter standard should have been used.

Mr. Calderon's argument is, therefore, that the low probative value of this evidence fails to be relevant.

The State attempts to bolster its argument by claiming that the victim told Officer Brock that she had seen Mr. Calderon with a very specific kind of gun. (State's brief at 25) The gun was silver with a black handle, and was a revolver. (47:38-43) However, Mr. Calderon argues that this description of a "very specific kind of gun" is still vague as it refers only to colors and a basic type (revolver instead of an automatic).

B. The trial court erred in balancing probative value over prejudicial effect

Mr. Calderon agrees with the State that the standard used to balance prejudicial effect is not any kind of prejudice but rather unfair prejudice. This standard was correctly and completely stated earlier in his brief (Calderon's brief at 7).

Mr. Calderon also takes issue with the State's summary of "propositions" that she says were established at trial. In fact, these "propositions" are conclusions, which the State assumes the jury reached. For example, the conflicting evidence was presented at trial as to whether Mr. Calderon had threatened the victim earlier. The victim herself told the jury that she could not remember being specifically threatened. The jury had to judge credibility of each and every witness, so the State cannot be sure of exactly what they believed when they returned the guilty verdict. In other words, these "propositions" may have been used by the jury in reaching their verdict, but the State cannot conclude that they were, in fact, agreed upon. This is speculation.

Mr. Calderon also disputes the claim in the State's brief on page 30 that the prosecutor already had evidence that Mr. Calderon could reach, and therefore had control over, the weapon found in the vehicle. This again is a conclusion that the jury may have reached. The evidence itself (without consideration of the former act of possession) simply established that Mr. Calderon was in the car when the gun was found. This does not show intent without further inferences.

The State seems to concede this in its brief on page 31 when she argues that the evidence of the prior gun possession was needed in order to rebut Calderon's contention that he did not know the gun was in the car. The State also argues that the act of prior possession of a gun was needed to prove Mr. Calderon's identity as the shooter in this case.

Both of these arguments must fail because of the low probative value of this evidence. First, the alleged prior gun possession incident was not needed at all in this case because, as the State points out on pages 30-31, there was

circumstantial evidence surrounding Mr. Calderon's stop and arrest to establish possible guilt without it on both counts.

The State then argues that the prior gun possession was needed at trial because there was no other evidence directly tying Calderon to the shooting. (See State's brief at 31) The State argues that the prior act of gun possession was the "only evidence having the tendency to identify the shooter as Calderon rather than some unknown suspect." (*Id.*)

First, there is nothing in the law to suggest that circumstantial evidence is in anyway inferior to any other kind. Second, it is unclear as to how evidence of a prior gun possession "directly ties" Calderon to the shooting. The alleged prior act of gun possession does not, in and of itself, establish what Mr. Calderon knew at the time he was stopped and arrested by the police.

The problem here is that this evidence of an act of alleged prior possession of a gun, has very low probative value. As the *Payano* court stated in *State v. Payano*, 2009 WI 86, ¶ 88:

As for unfair prejudice, in *Whitty*, this court stated that, to ensure a defendant's right to a fair trial, the circuit court must "carefully consider whether the prejudice of other-crimes [or other acts] evidence is so great as compared with its relevancy and the necessity for its admission in the particular case as to require its exclusion." Citations omitted.

Mr. Calderon has already argued that the low probative value of this evidence fails to make it relevant. Not only was it not relevant, but it was not necessary for admission in this particular case. The trial court was therefore wrong when it concluded that the probative value of the alleged prior possession had high probative value. (44:5)

III. Mr. Calderon's rights to a fair trial were jeopardized by allowing evidence to be admitted that allowed the jury to impermissibly infer prior gang membership and prior police contacts

The State first argues that the jury did not have to infer that Mr. Calderon was a member of a gang because it was not explicitly mentioned. (See State's brief at 34) This reference occurred during Officer Tracy's testimony. (47:27)

The State proceeds to argue that the jury could interpret the phrase "member of" in a benign way and that they would not necessarily have to draw a sinister inference. (*Id.*)

The standard here, however, is not whether the jury would necessarily have drawn a negative inference. Mr. Calderon is arguing that the jury was highly likely to make an inference that had been earlier prohibited by the trial court. Furthermore the danger of that impermissible inference tainted the verdict.

Similarly, the State also argues that prior police contacts were not explicitly mentioned when Officer Brock testified that he recognized the nickname of a person that the officers were familiar with and had dealt with in the past from the dispatcher's call. (47:35; see also State's brief at 34)

It is true that mentioning having dealt with Luigi in the past does not clearly demonstrate how many times that contact occurred. Nor does it give details about those contacts, however many they were. (State's brief at 35) However, this misses the point. There is a clear reference to *some* prior contact with police.

The State again proceeds to argue that the jury did not necessarily have to infer anything negative about those prior police contacts. (State's brief at 38) But this is unreasonable.

Prior police contacts are not, after all, social calls. This goes against common sense.

The State is wrong in concluding that *State v. Burton* has no application to Mr. Calderon's case. (State's brief at 36-38) Although many of its facts are distinguishable, Mr. Calderon was using it as an example that gang references and references to prior police contacts can be prejudicial.

On the other hand, Mr. Calderon takes issue with the State's claim that *State v. Long* is controlling in this case. *State v. Long* also has significantly different facts. In that case, evidence of a witness's gang affiliation was admitted to show bias in favor of the defendant. Here, the testimony regarding gang affiliation and prior police contacts came in against Mr. Calderon himself. This allows impermissible character inferences to be made.

The State concludes that if any error resulted from the admission of the other acts evidence, it was harmless because a jury would have convicted Mr. Calderon without that evidence. (State's brief at 40-41). The State then summarizes the six conclusions that it believes conclusively prove Mr. Calderon's guilt. (*Id.*)

But Mr. Calderon has not raised a sufficiency of evidence argument. His challenge is not that there were no facts to support a possible verdict of guilty. Rather, his challenge lies in the fact that the admission of other acts evidence creates unfair prejudice. It is unfair for two reasons. First, because that evidence has low probative value. Second, because it is highly likely that the jury used that evidence to make improper bad character inferences in reaching its verdict.

The inclusion of all of these errors makes the trial itself unfair at a due process level. The judge incorrectly assigned a high probative value to the prior gun possession, as

argued above. The prosecutor then proceeded to allow testimony that implicated Mr. Calderon's prior gang affiliation, which violated the trial court's order. Finally, prior police contact was clearly mentioned. (7) These errors allowed the jury to focus on Mr. Calderon's alleged bad character instead of properly admitted evidence.

CONCLUSION

For the reasons stated above and in Mr. Calderon's brief in chief, Mr. Calderon respectfully requests that his case be remanded for a new trial.

Dated this 10th day of October, 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 2,390 words.

Dated this 10th day of October, 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 10th day of October, 2015.

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