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STATE OF WISCONSIN

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STATE OF WISCONSIN,

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

Plaintiff-Respondent,

v.

TYSHUN DEMICHAEL YOUNG,

Defendant-Appellant.

BRIEF OF DEFENDANT-APPELLANT

Appeal No. 2016AP000657 CR

Trial Case No. 2013CF005132 (Milwaukee Co.)

APPEALED FROM THE JUDGMENT OF CONVICTION AND SENTENCE FILED
December 4, 2014 THE HONORABLE JOHN SIEFERT, PRESIDING

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TABLE OF CONTENTS

Page No.

Table of Contents.....	i
Table of Authorities.....	ii
Statement of Issues.....	1
Statement on Necessity of Oral Argument and Publication of Opinion.....	1
Statement of the Case.....	1
Statement of Facts	2
Argument	
I. THE TRIAL COURT ERRONEOUSLY EXERCISED ITS DISCRETION WHEN IT ALLOWED INTO EVIDENCE TESTIMONY REGARDING THE DEATH OF THE DEFENDANT'S BROTHER.....	11
A. APPLICABLE LAW.....	11
B. THE TESTIMONY WAS IRRELEVANT.....	15
C. THE EVIDENCE WAS UNDULY PREJUDICIAL.....	17
D. THE COURT'S RULING WAS FOUNDED ON A MISTAKEN VIEW OF THE EVIDENCE AND THE COURT'S RULING DID NOT USE A DEMONSTRATED RATIONAL PROCESS. THE COURT DID NOT REACH A REASONABLE CONCLUSION THAT A REASONABLE JUDGE COULD REACH.....	19
Conclusion.....	21
Certifications	
Appendix	

TABLE OF AUTHORITIES

<u>Cases Cited:</u>	Page
Christenson v. Economy Fire & Cas. Co., 77 Wis. 2d 50, 252 N.W. 2d 81 (1977).	18
Schultz v. Darlington Mut. Ins. Co., 181 Wis. 2d 646, 511 N.W. 2d 879 (1994)	19
State v. Abbott Lab., 2013 WI App 31, 346 Wis. 2d 565, 829 N.W. 2d 753.	11
State v. Ingram, 204 Wis. 2d 177, 554 N.W.2d 833, (Ct. App. 1996)	13
State v. Jackson, 216 Wis. 2d 646, 575 N.W. 2d 475 (1998)	18
State v. Johnson, 184 Wis. 2d 324, 516 N.W. 2d 463, (Ct. App. 1994)	12
State v. Jenkins, 168 Wis. 2d 175, 483 N.W. 2d 262, (Ct. App. 1992)	11
State v. Kimpel, 153 Wis. 2d 697, 451 N.W. 2d 790, (Ct. App. 1989)	12
State v. Payano, 2009 WI 86, 320 Wis. 2d 348, 768 N.W. 2d 832.	12
State v. Smith, 2001 WI APP 118, 254 Wis. 2d 654, 648 N.W.2d 15.	11, 19
State v. Sullivan, 216 Wis. 2d 768, 576 N.W. 2d 30 (1998)	13
State v. Wilson, 2015 WI 48, 362 Wis. 2d 193.	15
<u>Statutes:</u>	
§904.01.	12, 14
§904.03.	13, 14, 17

\$904.04.....	12
\$939.32.....	1
\$940.01.....	1

STATEMENT OF ISSUES

Whether the trial court erred when it allowed into evidence testimony regarding the shooting death of the defendant's brother, which occurred one year prior to the shooting in this case?

STATEMENT ON NECESSITY OF ORAL ARGUMENT & PUBLICATION OF OPINION

Respondent-appellant does not request oral argument. The issue presented can be fully argued in the parties' briefs. Also, the issue presented can be decided by the application of established legal principles, therefore publication is not warranted.

STATEMENT OF THE CASE

After a jury trial the defendant was convicted of one count of Attempted 1st Degree Intentional Homicide, contrary to §§940.01(1)(a) and 939.32 Stats., and one count of 1st Degree Recklessly Endangering Safety contrary to §941.30(1) Stats. The victims, D.D.B. and his sister D.T.B. were shot at their home on November 10, 2013. At trial, over objection, the State was allowed to elicit testimony from D.D.B. that a year to the day prior to the shooting at his home, the defendant's brother had been shot and killed.

STATEMENT OF FACTS

On the opening day of trial, while the parties were reviewing motions in limine, defense counsel referenced a police report he had been given that day. Defense counsel mentioned that there were statements in the report that there had been discussions with a number of the State's witnesses regarding a possible motive for the shooting in the case, and that there was a reference to the killing of Mr. Young's brother a year before this incident. Defense counsel wanted the State to be precluded from mentioning the incident. Counsel was concerned that the evidence could result in speculation regarding possible retaliation (R.40:14).

The State responded that the evidence provided a clear motive. The State indicated that it intended to argue that Mr. Young's motive to shoot D.D.B. was Mr. Young's belief that D.D.B. was involved in Mr. Young's brother's homicide (R.40:15). The State felt it was relevant so that the jury would not be left with the impression that the defendant just showed up at a random house and opened fire (R.40:16).

The court commented that the information was needed to set the scene, that it was not bad acts on the defendant's

part, and that the loss of a brother to a homicide was not prejudicial unless it was viewed as retaliation (R.40:16).

Defense counsel responded that the State meant to use it as motive and that the State's witnesses were directly questioned whether they had any idea why anyone would shoot at them, and they said no. Defense counsel indicated that there was nothing turned over to him that would make the evidence relevant to the trial (R.40:16).

The State argued that if the witnesses were willing to testify as to the defendant's motive for shooting them, it would be relevant. The court agreed stating that if, for example, one of the witnesses testified that he was shot in retaliation for his brother, that would be clearly relevant. Defense counsel agreed, but argued that was the exact opposite of what the discovery materials indicated (R.40:17). The court then indicated that perhaps the defense could use that to impeach the witness if the witness would testify differently at trial.

The State then informed the court that the shooting in this case occurred on the one-year anniversary of the shooting of the defendant's brother. The court responded that it felt that was something the State should be allowed to bring in (R.40:18).

Defense counsel argued that those facts were prejudicial to Mr. Young, that they weren't relevant to the shooting, and that they wouldn't lead to a determination that the defendant was more or less likely to have committed the offense. Defense counsel argued that the simple fact that there was an incident that happened earlier did not connect that incident to this incident. The court stated: "One year exactly? I think it's relevant. I'm going to allow it." (R.40:18,19).

Defense counsel went on to argue that the connection was simply the State's speculation. The defense also explained that allowing the evidence could result in litigating a separate homicide. The court denied the defense motion (R.40:20).

After jury selection the defense again addressed the issue. The defense stated its concern that if the State wanted to enter evidence regarding that homicide as motive they would need to dissect the earlier homicide and the roles people played in it, and whether it was plausible that the homicide was motivation for the present offense. The court reiterated its ruling that it was denying the motion in limine. The court indicated that the evidence could be objected to at trial (R.40:99,100).

At the opening of the trial the State gave its opening statement. It was short and to the point. The State explained that this case involved a shooting that occurred on November 10, 2013 at 4913 North 55th Street, which was a single family residence in Milwaukee. The State indicated that the jury would hear from two victims, a brother and sister who had returned from the grocery store and were preparing food before a Packer game. Around 12:30 there was a knock on a side door and another brother answered the door (R.41:8,9).

The person at the door asked for D.D.B. D.D.B. was called, and as he came to the door the person at the door started shooting. D.D.B. was hit and D.T.B., as she was coming out of the bathroom, was hit as well. The State argued that D.D.B. and his brother identified the defendant as the shooter (R.41:9,10,11).

The defense's opening statement was also to the point. The defense argued that the shooting made no sense. It noted that motive was not an element of the offense, but argued that it was something important for the jury to consider. The defense noted that when D.D.B. was asked by his brother why it happened, he didn't answer (R.41:13). The defense stated that when the police came he told them the defendant shot him, but he didn't know why. The

defense stated that motive was important because it was not a random shooting, but a shooting at a home. The defense noted that someone went to the house in the middle of the day, rang the doorbell, asked for a specific individual, waited for that person to come to the door and then fired shots inside the house. The defense indicated that there had to be a motive, and that was something for the jury to consider (R.41:14).

The defense noted that the two persons who identified the defendant were brothers with multiple criminal convictions, and their sister, who could not identify the defendant. There was no physical evidence. The defense indicated that Tyshun's mother would testify that he was in Chicago (R.41:14,15,16).

The first witness called by the State was Officer Elgerith Tucker. His testimony was short. He indicated that he was dispatched to a shooting at about 12:30 in the afternoon on November 10, 2013 at 4913 North 55th Street in Milwaukee. When he arrived at the location he saw male and female shooting victims. He secured the scene and waited for the detectives (R.41:19,20).

After Officer Tucker's brief testimony the State called D.D.B. He identified the defendant in court and indicated he had known him for a few years (R.41:24). He

said he knew Mr. Young through Mr. Young's family and said that he had seen him numerous times. He testified that on the day of the shooting he had been shopping with his sister (R.41:25). He had just returned home when he heard the doorbell ringing (R.41:27). It was about 12:30. His brother answered the door and told him someone was at the door for him (R.41:27,28). He said he went to the door but didn't see anyone there at first. He asked who was there and was shot at. He testified that he saw the defendant shoot him (R.41:28). He testified that he turned and ran to the kitchen (R.41:30).

D.D.B. testified that he didn't remember telling police officers who shot him. He indicated that he was taken to the hospital and didn't remember anything he said while at the hospital. He indicated that he had been convicted of a crime four times before and that he was on probation at the time of trial (R.41:32).

After the above testimony, the following testimony was elicited by the State:

Q: You're friends with the defendant, Mr. Young, right?

A: At least I thought I was.

Q: Did you know the defendant's brother, Wendall Watson?

A: Yes.

Q: Mr. Watson was killed the year before you were shot?

MR. MEYLINK: I'm going to object to this line of questioning.

THE COURT: Overrule at this point.

Q: Mr. Watson, the defendant's brother, was shot and killed a year before you were shot, right?

A: Yes.

Q: In fact, it was a year to the day on November 10 of 2012?

Q: Yes.

Q: Now, do you have any idea why the defendant would shoot you?

MR. MEYLINK: I'm going to object.

THE WITNESS: Not to my knowledge.

THE COURT: Okay. It's asked and answered. The objection is also noted in the record.

MR. MEYLINK: I'm sorry, Judge? Is it overruled?

THE COURT: The objection - the answer is in the record. It will remain in the record.

(R.41:32,33).

Shortly after the above testimony the State ended its questioning of D.D.B.

On cross examination the defense asked questions regarding the relationship between D.D.B. and Mr. Watson, the defendant's brother. D.D.B. indicated that in the case involving the death of Mr. Watson, D.D.B. was to be a

witness for the State. D.D.B. testified that there would be no reason therefore for Mr. Young to be mad at D.D.B. He admitted that he couldn't think of any reason for the shooting (R.41:40).

In its closing argument the State attempted to address the defense's obvious argument that there was no reason for the defendant to shoot D.D.B. The State argued that when D.D.B.'s mom asked him who shot him and why, D.D.B. said it was the defendant, but argued that D.D.B. didn't want to tell his mother why (R.43:53). The State then ran through the elements of the offenses and began its substantive argument regarding attempted intentional homicide by arguing that it was not a recklessly endangering safety case, because the defendant was at the house with the intent to kill. The State began its argument regarding intent to kill by stating: "Now, to the first element, that he intended to kill (D.D.B.), what evidence is there of that? You heard that the day this happened, November 10 of 2013, was the one-year anniversary of the defendant's brother's death. (D.D.B.) was targeted because of that day's significance." (R.43:56). Then, at the end of its initial summation to the jury the State, after identifying some "nitpicking" the defense might do regarding the type of weapon used, ended by saying: "What does that matter?

... But if you look at all the evidence, all the consistency with the identification, the fact that this happened on the anniversary of the defendant's brother's death, there can be only one verdict, and that's that the defendant went to the house to get his revenge." (R.43:66).

In its rebuttal argument the State again stressed the importance of the shooting occurring on the anniversary of the death of Mr. Young's brother. It argued: "to believe the defendant's version of what happened, you have to believe that he's the unluckiest man in the world, that on the year anniversary of his brother's death, some random person shows up at the (B's) residence for absolutely no reason" (R.43:92). At the very end of its summation the State argued: "What happened here, ladies and gentlemen, was much simpler. The defendant, after living with his grief, living with the grief of his mother, of his family--You saw her grief on the stand, she's still rightfully heartbroken about what happened to her son--the defendant had to live with that three times a day for a year. And on the one-year anniversary, he had enough. He went over to the (B's) house, asked for (D.D.B.). When (D.D.B.) came out, he opened fire because he was trying to kill him." (R.43:95).

I. THE TRIAL COURT ERRONEOUSLY EXERCISED ITS DISCRETION WHEN IT ALLOWED INTO EVIDENCE TESTIMONY REGARDING THE DEATH OF THE DEFENDANT'S BROTHER.

The trial court erred when it allowed into evidence testimony regarding the shooting of the defendant's brother one year prior to the shooting in this case. It did not prove motive. The testimony was irrelevant and unduly prejudicial.

A. APPLICABLE LAW

A trial court's determination to admit or exclude evidence is a discretionary decision that will not be upset on appeal absent an erroneous exercise of discretion. **State v. Jenkins**, 168 Wis. 2d 175, 186, 483 N.W. 2d 262 (Ct. App. 1992).

We review evidentiary issues to determine if the trial court applied the correct law to the relevant facts and reached a reasonable conclusion. **State v. Smith**, 2001 WI APP 118, ¶¶7-8, 254 Wis. 2d 654, 648 N.W.2d 15.

We will not disturb a circuit court's evidentiary ruling if the circuit court "'examined the relevant facts, applied a proper standard of law, used a demonstrated rational process, and reached a conclusion that a reasonable judge could reach.'" **State v. Abbott Lab.**, 2013

WI App 31, ¶31, 346 Wis. 2d 565, 829 N.W. 2d 753 (citation omitted).

If, for whatever reasons, the circuit court failed to delineate the factors that influenced its decision, then it erroneously exercised its discretion. **State v. Payano**, 320 Wis. 2d 348, 377. ¶41.

At first blush, this case could appear to be an “other acts” case governed by §904.04(2), STATS. In Wisconsin, the admissibility of other acts evidence is governed by WIS. STAT, §904.04(2), which provides:

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 rule is not limited solely to a defendant’s acts; it is applicable to any “person.” See **State v. Johnson**, 184 Wis. 2d 324, 336 citing **State v. Kimpel**, 153 Wis. 2d 697, 704-04.

The admission of evidence under the statute is governed by a three-step analysis: (1) whether the evidence is offered for a permissible purpose, as required by §904.04(2)(a); (2) whether the evidence is relevant within the meaning of WIS. STAT §904.01; and (3) whether the probative value of the evidence is substantially outweighed

by the concerns enumerated in WIS. STAT. §904.03. See **State v. Sullivan**, 216 Wis. 2d 768, 772-73, 576 N.W. 2d30 (1998).

WIS. STAT. §904.03 addresses whether the probative value of evidence is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence.

The problem with analyzing the testimony in this case as other acts evidence is that the other acts evidence did not consist of other acts committed by any witness in the case. The homicide referred to was not committed by anyone associated with this case. The concern the statute addresses, i.e. the concern that an actor will be considered to have committed a current offense because he committed a previous offense, does not apply. Therefore, although the analytical framework seems applicable, the applicability of the statute to this fact situation does not.

In **State v. Ingram**, 204 Wis. 2d 177 (Ct. App. 1996), the court was presented with a case where the defendant argued that other acts evidence in the form of a probation officer's testimony regarding the defendant's criminal history was improperly admitted. The court of appeals noted that the trial court disagreed that the case was an "other

acts" case under the statute. Nevertheless, the court of appeals evaluated the admissibility of the evidence in terms of whether the evidence was related to the defendant's motive, whether it was relevant and whether it was unduly prejudicial.

We believe in this case the distinction between whether the challenged evidence constituted "other-acts" evidence is a relative non-issue, and this court's review of the circuit court's decision to admit the evidence remains largely the same whether the evidence is treated as "other-acts" or not. This is so because, here, as in **Ingram**, the issues to be addressed are whether the evidence was properly related to the defendant's motive, whether it was relevant, and whether it was unduly prejudicial. The questions under **Sullivan's** second and third steps, regarding relevance, probativeness, and the threat of unfair prejudice, correspond to the traditional inquiry for direct evidence under Wis. Stat. § 904.01 and § 904.03.

B. THE TESTIMONY WAS IRRELEVANT

§904.01 STATS defines relevant evidence as "... evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

At the outset of its argument that the earlier killing of Mr. Young's brother should not be put before the jury, defense counsel articulated his concern that the evidence could invite speculation regarding retaliation (R.40:14). Our rules of evidence treat evidence that calls for speculation as inadmissible.

In the context of a case wherein a defendant sought to introduce evidence that a third party may have committed the crime the defendant was on trial for, our supreme court stated: "(e)vidence of a mere possibility that a third party may have committed the crime charged is deemed inadmissible because it calls for speculation, creates a trial within a trial, and lacks the sufficient indicia of reliability or probative value so to qualify as admissible evidence." **State v. Wilson**, 2015 WI 48, ¶95, 362 Wis. 2d 193, 235.

That is what happened here. When arguing that the killing of Tyshun's brother the year before was relevant, the State informed the court that it intended to argue that Tyshun believed that D.D.B. was involved in his brother's death. However, the State never introduced any evidence that Tyshun believed that D.D.B. was involved in the death of Tyshun's brother. The jury could only base such a finding on speculation.

Defense counsel anticipated the State's inability to connect the two shootings. At the motion hearing defense counsel informed the court that there was nothing in the discovery that indicated Tyshun blamed D.D.B. for Tyshun's brother's death. The trial court, obviously assuming that the State would be introducing such testimony, told defense counsel he might then be able to impeach the State's witnesses. However, there were no witnesses to impeach. The State had no proof that Tyshun blamed D.D.B. for the death of Tyshun's brother. No one testified that Tyshun held D.D.B. responsible. The State did not attempt to impeach a witness, or put in direct evidence through a witness, that Tyshun blamed D.D.B.

Because there was nothing of significance to connect the shootings, the evidence did not serve to make any fact more or less probable than without the evidence.

Another concern raised by defense counsel was that letting in evidence of the prior shooting would result in a trial in a trial because the circumstances of the prior shooting would have to be explored to establish motive. That made sense. What happened at the time of the shooting would need to be known to establish why Tyshun would hold D.D.B. responsible. The State however did not even explore the circumstances surrounding the shooting and what

D.D.B.'s role, if any, might have been. The only evidence in that regard showed that D.D.B. was a friend of Tyshun's brother, and was going to testify for the State in the prosecution of the shooter. This hardly constitutes relevant evidence of motive.

The State argued to the court that the death of Tyshun's brother was relevant because the State didn't want the jury to think the defendant just showed up at a random house and opened fire. Of course the State didn't want the jury to think that. As the defense argued, it made no sense. Not wanting the jury to believe something however does not make evidence relevant, and it is not a basis for introducing irrelevant and prejudicial testimony.

C. THE EVIDENCE WAS UNDULY PREJUDICIAL

Wisconsin Statute §904.04(3) provides:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Evidence is prejudicial if it 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." **State v. Jackson**, 216 Wis. 2d 646, 667, 575 N.W. 2d 475 (1998) (citations omitted).

The standard for unfair prejudice is whether the evidence tends to influence the outcome of the case on an improper basis. **State v. Johnson**, 184 Wis. 2d 324, 340, 516 N.W. 2d 463 (Ct. App. 1994); see also **Christenson v. Economy Fire & Cas. Co.**, 77 Wis. 2d 50, 61, n.11., 252 N.W. 2d 81 (1977).

Defense counsel argued to the court that it was unduly prejudicial to introduce evidence of the mere fact that a shooting occurred one year prior to the shooting in this case. As mentioned above, counsel anticipated the State's inability to connect the shooting to the defendant's alleged motive to shoot D.D.B. Without that connection, it was unduly prejudicial to inform the jury of the prior homicide. Few things could arouse an emotional response in a jury, or cause it to base its decision on something other than the established propositions in a case, more so than the homicide of a sibling.

Here, no motive was ever established, only a tenuous connection at best because of the dates of the shootings.

This emotionally laden testimony should not have been submitted to the jury.

D. THE COURT'S RULING WAS FOUNDED ON A MISTAKEN VIEW OF THE EVIDENCE AND THE COURT'S RULING DID NOT USE A DEMONSTRATED RATIONAL PROCESS. THE COURT DID NOT REACH A REASONABLE CONCLUSION THAT A REASONABLE JUDGE COULD REACH.

The law provides that a trial court erroneously exercises its discretion if its decision is grounded on factual mistakes or a mistaken view of the evidence. **Schultz v. Darlington Mut. Ins. Co.**, 181 Wis. 2d 646, 659, 511 N.W. 2d 879 (1994).

The law also requires that a trial court apply the correct law to the relevant facts and reach a reasonable conclusion. **Smith**, 2001 WI APP 118, ¶¶7-8, 254 Wis. 2d 654, 648 N.W.2d 15.

We believe the court's determination to admit the evidence was founded on a mistaken view of the evidence and that the decision to admit the evidence was not reasonable given the facts of the case.

When the State indicated to the court that the State intended to argue that Mr. Young's motive to shoot D.D.B. was Mr. Young's belief that D.D.B. was involved in Mr. Young's brother's homicide, the court commented that the

information was necessary to "set the scene." We believe the court was mistaken in that it believed that the scene would be completed by some evidence that Mr. Young held D.D.B. responsible in some way. When defense counsel argued that nothing in the discovery indicated there was a connection, the State responded by saying that that would go to the credibility of the witnesses. This is a clear indication to the court that witnesses were prepared to testify to the defendant's motive. To make things even clearer, the State went on to say: "Like I said, I don't anticipate bringing in an officer or something to backdoor information as to motive for the homicide. But if the witnesses are willing to testify as to the defendant's motive for shooting them, then I think it's certainly relevant. He can certainly cross-examine them." (R.40:17).

The court responded: "If, for example, one of the victim/witnesses says he told me he shot me because this is in retaliation for my brother, clearly relevant." (R.40:17).

As can be seen from the above, the court was under the impression the evidence would show a connection between the shooting and Tyshun's state of mind. No connection was forthcoming.

We also believe the court did not come to a reasonable conclusion regarding the admissibility of the evidence. Near the end of the pretrial argument over the admissibility of the prior shooting, the State pointed out that the shooting in this case occurred one year to the day after the prior shooting. The court responded, "(o)ne year exactly? I think it's relevant. I'm going to allow it." (R.40:18,19).

We believe it was unreasonable for the court to rely on the one year period of time between shootings as a basis for the admissibility of the evidence. As we argued above, few fact situations can be expected to evoke an emotional response from a jury like the death of a sibling. The court's own response shows the emotional power of the anniversary. Given the emotional power of the evidence, in combination with the lack of any other evidence connecting the two shootings, it was unreasonable to allow the introduction of the evidence by the State.

CONCLUSION

The morning of trial the defense was presented with reports regarding the shooting death of Mr. Young's brother. It was obviously a theory of the defense that there was no motive for Mr. Young to target D.D.B. The

defense, very astutely, moved for exclusion of the evidence.

The State also recognized that, in what appeared to be a targeted shooting, a jury would want to know, "why"? In its presentation of the case, the State tried very hard to answer that question. However, the State's argument that this was a revenge shooting was pure speculation. The evidence was therefore irrelevant.

If this court believes there was marginal relevance because of the dates of the shootings, the evidence was unduly prejudicial. It should not have been admitted. We therefore request that the defendant's conviction be vacated.

Dated: _____, 2016.

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CERTIFICATION

I certify that this brief conforms to the rules contained in sec. 809.19(8)(b) and (c) Stats., for a brief produced in non-proportional type with a courier font and is 23 pages long including this page.

Dated: _____, 2016.

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

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

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

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

Dated: _____, 2016.

GRAU LAW OFFICE

By: _____
John J. Grau

APPELLANT'S BRIEF APPENDIX CERTIFICATION

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 s. 809.19(2)(a) and that contains, at a minimum:

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

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

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of person, 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: _____, 2016.

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INDEX TO APPENDIX

PAGE

Judgment of Conviction.....	A 1
Pretrial Discussion of Admissibility.....	A 3