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11-14-2017

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TERRELL DAWON ESSEX,

Defendant-Appellant.

ON APPEAL FROM
THE JUDGMENT OF CONVICTION
DATED NOVEMBER 23, 2016
THE HONORABLE JEFFREY WAGNER,
MILWAUKEE COUNTY CIRCUIT COURT, PRESIDING

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	ii
ISSUE PRESENTED FOR REVIEW.....	1
STATEMENT ON ORAL ARGUMENT AND PUBLICATION.....	1
STATEMENT OF THE CASE.....	1
STATEMENT OF FACTS.....	3
ARGUMENT.....	10
I. THE OTHER ACTS EVIDENCE IN THE FORM OF EVIDENCE OF ANOTHER SHOOTING AND MATCHING BALLISTICSSHOULD NOT HAVE BEEN ADMITTED.	10
A. THE STANDARD OF REVIEW	10
B. THE OTHER ACTS EVIDENCE SHOULD NOT HAVE BEEN ADMITTED AS IT WAS IRRELEVANT AND SUBSTANTIALLY PREJUDICIAL	11
CONCLUSION	15

TABLE OF AUTHORITIES

<u>Case Law cite</u>	<u>Page</u>
<i>State v. Davidson</i> , 2000 WI 91, 236 Wis. 2d 537, 613 N.W.2d 606	10
<i>State v. Hereford</i> , 195 Wis. 2d 1054, 537 N.W.2d 62 (Ct App 1995)13
<i>State v. Hunt</i> , 2003 WI 81, 263 Wis. 2d 1, 666 N.W.2d 77110
<i>State v. Hurley</i> , 2015 WI 35, 361 Wis. 2d 529, 861 N.W.2d 17414
<i>State v. Martinez</i> , 2011 WI 12, 331 Wis. 2d 568, 797 N.W.2d 399)	10
<i>State v. Sullivan</i> , 216 Wis. 2d 768, 576 N.W.2d 30 (1998)	11

Wisconsin Statutes Cited

§ 904.04(2)11
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ISSUES PRESENTED FOR REVIEW

1. Did the trial court err when it allowed the state to present other acts evidence of a shooting where the defendant was the victim, and there were casings found in the back of seat of his car that matched the casings found in this case?

The court allowed the other acts evidence.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Mr. Essex requests oral argument and publication.

STATEMENT OF THE CASE

Mr. Essex was originally charged with one count of possession of a firearm by a felon. (R.2). After the preliminary hearing, the state filed an Amended information charging Mr. Essex with an additional count of First Degree reckless homicide as PTAC and as an habitual offender. (R.9).

The state had been waiting for a ballistics report on the bullet from the victim and a bullet from a prior shooting. (See R.128). On June 1, 2014, the crime laboratory report came back and stated that the cartridges matched. (R.129). The state then filed a Motion to Introduce Other Acts evidence. (R.16). The state sought to admit evidence of casings found at a shooting that occurred on May 3, 2015, where the defendant, Mr. Essex was shot. *Id.* This shooting occurred when someone shot at the defendant's vehicle and someone in the defendant's vehicle returned fire. *Id.* The state sought to introduce the evidence as other acts to show identity and absence of mistake. *Id.* The court ultimately decided to allow the evidence. (R.131:14-16, App. 116-118).

Mr. Essex proceeded to trial and on October 26, 2016, he was convicted on both counts by a jury. (R.142). On November 21, 2016, Mr. Essex was sentenced to a total sentence of 50 years with 35 years of incarceration and 15 years of extended supervision. (R. 111, App. 101).

This is an appeal of the convictions.

STATEMENT OF FACTS

On October 21, 2015, Officer Gallenberg was working as a City of Milwaukee police officer when he was dispatched to the area of 27th and Highland. (R.138:57-58). When he arrived, he found a subject lying face down and determined that he was T.D. *Id.* T.D. was breathing shallow and they turned him over to look for gunshot wounds. *Id.* He then stopped breathing. *Id.*

Officer Rabideau was sent to the scene as well and when he arrived, he encountered a woman who was agitated and bleeding from her right arm. (R.138:65). This woman pointed out a white Cadillac to him and he saw the car heading east. *Id.* The officer was able to remember a partial license plate of 373. (R.138:66). This witness was eventually identified as Ramona Miller. (R.138:71).

Ramona Miller testified that on October 21, 2015, she was visiting her brother at his apartment building. (R.138:105). She testified that she was present when T.D. was shot and killed. (R.138:106). She saw T.D. sitting on the front stoop of the building, drinking. (R.138:107). She also saw a white Cadillac drive up Juneau in front of the apartment building. *Id.* She went inside and then came

out about two minutes later and noticed two black males approach T.D. while he was on the stairs. (R.138:109-110). She identified Mr. Essex as one of the two men. *Id.* The man with the defendant was talking to T.D. and was upset. Mr. Essex was more quiet. (R.138:112).

Ms. Miller walked down the front steps, through the argument and then to the corner. While she did this, she saw the man with Mr. Essex, who is known as Bee Bee make a motion to the victim as if he had a gun. (R.138:113). She testified that Mr. Essex told Bee Bee "to shut the F up and pass him his piece." (R.138:113). She testified she was walking away and felt a rush of air, when she turned around she claimed that she saw Mr. Essex pointing a gun at her. (R.138:115). She put her elbow up, and then was shot in the arm. *Id.* Once she was shot, she took off running and testified that Mr. Essex shot at her repeatedly. (R.138:116).

Ms. Miller testified that she has been convicted of a crime 13 times and that she did give a false name to the officer when he first questioned her. (R.138:118). She did view a photo array and picked out Mr. Essex as the person who shot at her. (R.138:121). She also identified

Bee Bee. (R.138:123). Ms. Miller had described the shooter as late twenties, 5'4" to 5'5" and a stocky build with a dark complexion. (R.139:4).

Latosha Holmes, the girlfriend of T.D., testified. T.D.'s nickname was Reese Bo and he was "associates" with Terrell Essex. (R.141:6). She also identified Bee as the cousin of Terrell Essex. (R.141:7). On the day that T.D. was killed, she was with him and Terrell Essex driving around. (R.141:7). They were riding in Terrell's white 4-door Cadillac. (R.141:8). They dropped off her daughter and then went to another friend's house where they drank. (R.141:11). At one point when they were in Terrell's vehicle, T.D. and Terrell argued about gas. (R.141:14). According to Latosha, Terrell wanted money for gas and T.D. did not have any money so they argued. (R.141:15). Then Terrell pulled out a gun to scare T.D. (R.141:16-17). Everyone then calmed down, they got out of the car, but she had left her cell phone in the back seat. (R.141:18). T.D. was outside her apartment on the front steps trying to get her cell phone back from Mr. Essex. (R.141:19). She heard gunshots and ran outside to find T.D. shot. *Id.* She looked up and saw Terrell in the driver's side of his

vehicle hitting the steering wheel. (R.141:20).

The medical examiner testified that T.D. had 7 gunshot wounds that the cause of death was from multiple gunshot wounds. (R.141:50,56).

Detective Devalkenaere testified that his role in the investigation was to try to locate the white Cadillac which had been identified at the scene. (R.139:30). He did locate that vehicle at a residence where Shineka Ellison, the mother of some of Mr. Essex's children, lived. (R.139:31). It was not the residence of Mr. Essex. (R.139:38). The license plate of the vehicle was 323 UWE, not the 373 that Officer Rabideau identified. (R.139:32). The vehicle was towed and then searched. During that search he found a citation in the driver's side visor for Terrell Essex. (R.139:34).

The vehicle was processed for finger prints. (R.139:40). Prints were recovered from the front passenger door and suspected DNA was collected from the interior door handles. (R.139:43-44). Of the four latent finger prints lifted from the car, one was not sufficient for comparison and the other three prints did not belong to Mr. Essex. (R.139:50-51). The victim, T.D., was identified on two of

the fingerprints on the rear passenger door. (R.139:51).

The fourth fingerprint belonged to a Maurice Gardner. *Id.*

Two cigarette butts were found on the scene and tested for DNA. On one of the cigarettes, there was a mixture of DNA with T.D. being the source of the major male profile.

(R.139:70). Mr. Essex was included as a possible contributor to the mixture at seven genetic locations.

(R.139:71). The ratio for Mr. Essex being a contributor was one in 18,000. *Id.* For the second cigarette butt, Mr. Essex was included as a possible contributor to the overall profile and the statistic was one in 462,000. (R.139:73).

Detective Wooden testified regarding the other acts evidence. He was involved in the investigation of a shooting that occurred on May 3, 2015 where Mr. Essex was shot. (R.141:32-33). Essex was in the hospital and made a statement to Detective Wooden that he was shot at by people in another vehicle. (R.141:33). He was seated in the rear seat behind the driver when the shooting occurred.

(R.141:34). Other detectives then located the vehicle that Mr. Essex was in when he was shot. *Id.* This vehicle was in Mr. Essex' name and was not a white Cadillac.

(R.141:36). Mr. Essex told the detective that he did not

have a gun and did not shoot at anyone from the vehicle.
(R.141:37).

Detective Harms testified that she searched the defendant's vehicle after the shooting and found fired cartridges in the rear floorboards. (R.141:42). These casings were 9mm and were consistent with someone in the back seat firing a gun. (R.141:45).

Xai Xiong, a firearm and tool mark examiner from the Wisconsin State Crime Laboratory testified regarding his examination of fired cartridge casings in this case. (R.141:63). There were ten fired cartridge casings. (R.141:64). The caliber of the casings was 9mm and they were all fired from the same gun. (R.141:65). He also examined seven fired cartridge casings from the prior shooting and determined that the seven cartridge casings matched the ten cartridge casings in this case and were fired from the same gun. (R.141:69).

Mr. Essex testified that on October 21, 2015, T.D. called him asking him for a ride. So around 1 o'clock, he picked up T.D. and took him to his house. (R.141:85-86). Latosha was with them as well. *Id.* The three of them went to a friend's house for drinks, and then some time around

six, he dropped off Latosha, Reese Bo and her daughter Princess. (R.141:90).

Mr. Essex testified that he did have an argument with T.D., but they then were fine and he drove off leaving Reese Bo and Latosha at her apartment. (R.141:91-92). T.D. later called him and asked him to look for Latosha's phone in the back seat of his car. (R.141:92). He did look, but never found it. *Id.* Mr. Essex then went to his son's football practice and then home. *Id.* He later got a phone call telling him that Reese Bo had been involved in a shooting. (R.141:93). He drove to the area where he was told it happened, but did not stop. Later, he found out the police were looking for him. (R.141:94). Mr. Essex testified that he did not shoot T.D. (R.141:94).

Regarding the shooting on May 3, 2015, he testified that he did not fire a gun on that day. (R.141:95).

ARGUMENT

I. THE OTHER ACTS EVIDENCE IN THE FORM OF EVIDENCE OF ANOTHER SHOOTING AND MATCHING BALLISTICS SHOULD NOT HAVE BEEN ADMITTED.

A. THE STANDARD OF REVIEW

The admission of other-acts evidence is within the trial court's discretion. *State v. Davidson*, 2000 WI 91, ¶38, 236 Wis. 2d 537, 613 N.W.2d 606. "We review a circuit court's admission of other-acts evidence for an erroneous exercise of discretion." *State v. Martinez*, 2011 WI 12, ¶17, 331 Wis. 2d 568, 797 N.W.2d 399 (*citing State v. Hunt*, 2003 WI 81, ¶34, 263 Wis. 2d 1, 666 N.W.2d 771). A reviewing court will uphold a circuit court's evidentiary ruling if it "'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.'" *Id.* (quoting *Hunt*, 263 Wis. 2d 1, ¶34).

B. THE OTHER ACTS EVIDENCE SHOULD NOT HAVE BEEN ADMITTED AS IT WAS IRRELEVANT AND SUBSTANTIALLY PREJUDICIAL.

Pursuant to *State v. Sullivan*, 216 Wis. 2d 768, 772-773, 576 N.W.2d 30 (1998), there is a three-step test the court must follow when determining the admissibility of other acts evidence. First, that the evidence fits within one of the exceptions of Wis. Stat. § 904.04(2), second, that the evidence is relevant and third, that the probative value of the evidence is not substantially outweighed by the prejudice to the defendant.

The state first argued that this evidence was admissible as direct evidence. However, as the defense pointed out, there was no direct evidence to show that Mr. Essex had a gun or shot a gun that day. The state also argued that it was admissible to show identity.

The defense argued that the evidence was not admissible as direct evidence and that if the court found it to be relevant to show identity that the evidence would still be unduly prejudicial. The defense argued:

I think when we're going to prohibitive value though, as far as unfair prejudice, we're talking about this earlier shooting, we're talking about Mr. Essex being involved in an earlier shooting. It's clearly prejudicial to him if that

information comes in. Whether it happened or didn't happen, that's going to be very prejudicial to him. (R.131:10, App. 112).

The court ultimately decided to allow this evidence to be presented. The court found that:

Okay. So I do think that it's relevant evidence. I understand that it's not irrefutable evidence, that there are ways in which you can poke holes in it, but I do think it's highly relevant for identification purposes.

In many ways, I agree it is direct evidence. In some ways, thought, it does fall under the other acts evidence in the sense that because Mr. Essex was already not - I mean, he was a felon at the time of this shooting five months prior to this, so he shouldn't have had the gun. So even if he's shooting in self-defense, he's still afoul of the law. (R.131:14, App. 116).

The court went on to state:

But, most fundamentally, this is very, very prohibitive evidence. Whether it's rock solid does not limit that relevancy, that prohibitive value, to such a point as to take away the basic conclusion that it's highly relevant.

Given that, then, I don't think it's prejudicial value substantially outweighs that prohibitive value . . . (R.131:15, App. 117).

This evidence should not have been admitted as there

was no evidence that Mr. Essex possessed the gun from which the cartridges were fired in the May 3rd incident. Specifically, Detective Wooden testified regarding the statement made by Mr. Essex regarding the May 3rd, 2015 shooting. Essex told Detective Wooden that he was shot at by people in another vehicle. (R.141:33). He was seated in the rear seat behind the driver when the shooting occurred. (R.141:34). There were other people in the car at the time Essex was shot and Essex told Wooden that he did not have a gun and did not shoot at anyone from the vehicle. (R.141:37). The gun was never recovered from either scene.

There are cases that allow other acts evidence in the form of a prior event where a defendant had a gun previously. In *State v. Hereford*, 195 Wis. 2d 1054, 537 N.W.2d 62 (CT. App. 1995), the defendant's gun was seen in his vehicle and on the night of the shooting, he said he was going to the vehicle to "get his shit", meaning his gun. *Hereford*, 195 Wis. 2d at 1068. In this case, there are fired cartridges found in the back seat of the defendant's vehicle. However, there were other people in the vehicle and there is no one who saw Mr. Essex shooting

or who saw him with a gun during the May, 2015 incident.

Any probative value of this evidence was substantially outweighed by the undue prejudice to Mr. Essex. The critical issue here is whether or not the introduction of this evidence, that Essex was involved in a shooting months before the shooting of T.D., shocked the jury unduly influenced their decision. "Prejudice is not based on simple harm to the opposing party's case, but rather, 'whether the evidence tends to influence the outcome of the case by improper means.'" *State v. Hurley*, 2015 WI 35, ¶87, 361 Wis. 2d 529, 861 N.W.2d 174. In some cases, a limiting instruction can help alleviate any unfair prejudice. *Id.* at ¶86. But no limiting instruction was given in this case.

The circuit court's decision to allow the state to present other acts evidence of the matching ballistics of the fired cartridges found in this case with the fired cartridges found in the defendant's car months before was error. Mr. Essex was shot in the May, 2015 incident and there was no direct proof that Mr. Essex was the one who fired the firearm and put those bullet casings in his vehicle in May of 2015. This evidence was unduly

prejudicial and Because of this, the circuit court abused its discretion when it allowed this evidence to be presented to the jury.

CONCLUSION

The circuit erred when it allowed the other acts evidence to be presented at trial. For this reason, the convictions should be reversed.

DATED this 9th day of November, 2017.

Respectfully submitted,

/s/Angela C. Kachelski
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LENGTH AND FORM CERTIFICATION

This brief meets the form and length requirements of Rule 809.19(b) and (c), in that it is:

15 pages long.

Typewritten (10 spaces per inch, non-proportional font, double spaced, 1½ inch margin on the left and 1 inch margin on other three sides.

Dated this 9th day of November, 2017.

/s/Angela C. Kachelski
Angela C. Kachelski

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 s. 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 9th day of November, 2017.

/s/Angela Kachelski
Angela Kachelski

STATEMENT OF SERVICE AND MAILING

Counsel hereby certifies that she has sent an original and nine copies of this Brief to this court via the United States Post Office. Counsel also certifies that she has served three copies of this Brief on the Attorney General's Office via the United States Post Office this 9th day of November, 2017.

/s/ Angela C. Kachelski
Angela C. Kachelski

Appendix Table of Contents

Judgment of Conviction. App. 101

Transcript of motion hearing, June 23, 2016,
decision by the circuit court allowing the
other acts evidence to be admitted at trial. . . . App. 103