STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2017AP1509-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TERRELL DAWON ESSEX,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN THE CIRCUIT COURT FOR MILWAUKEE COUNTY, THE HONORABLE JEFFREY A. WAGNER, PRESIDING

RESPONSE BRIEF OF PLAINTIFF-RESPONDENT

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ISSUE PRESENTED

To prove that Terrell Dawon Essex possessed a firearm as a felon and to link Essex to the gun that shot and killed Terry Dotson in October 2015, the State sought to admit evidence that in May 2015, police had found in Essex's car casings that had been discharged from the same gun that killed Dotson. Did the circuit court soundly exercise its discretion when it admitted that evidence?

The circuit court suggested that the evidence was admissible as direct evidence, but also determined that it satisfied the other-act test for admissibility.

This Court should affirm.

INTRODUCTION

On October 21, 2015, Terry Dotson was shot to death outside his girlfriend's apartment building. A witness saw Essex and another man arguing with Dotson seconds before Dotson was shot. That witness and Dotson's girlfriend also saw Essex in Essex's nearby-parked car immediately after the shooting. Neither witness saw the actual shooting, and the gun was never recovered.

The State charged Essex with possession of a firearm as a felon and first-degree reckless homicide, as a party to a crime. The State sought to admit, as direct evidence and alternatively, other-act evidence, the following pieces of evidence: (1) seven 9mm bullet casings that police had found in Essex's car when investigating an incident in May 2015 in which Essex was the victim of a drive-by shooting; and (2) a report and testimony from a crime lab analyst that those casings were discharged by a weapon fired from inside Essex's car, and that based on a comparison to casings found around Dotson's body, that weapon was the same one used to kill Dotson.

The circuit court allowed the State to use that evidence. It suggested that it was admissible as direct evidence connecting Essex to the murder weapon, but also concluded that it satisfied the other-act analysis. After a three-day trial, a jury found Essex guilty of both charges.

On appeal, Essex challenges the circuit court's evidentiary decision admitting the evidence of the casings found in his car. He cannot prevail. The evidence is admissible either as direct evidence connecting Essex to the murder weapon or as other-act evidence. Further, any error in admitting the evidence was harmless. This Court should affirm.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request either. This Court may resolve the legal issue presented by applying established law, and the parties' briefs adequately present the facts.

STATEMENT OF THE CASE

I. Factual background

A jury convicted Essex of felon in possession of a firearm and first-degree reckless homicide as party to a crime. The charges were based on Essex's acts on October 21, 2015, when witnesses saw Essex pull a gun on Terry Dotson while the two men were fighting, and the shooting death of Dotson that occurred later that day after witnesses saw Essex and another man arguing with Dotson. (R. 2; 114.) At issue at trial was the identity of Dotson's shooter; no one saw Dotson being shot, and the gun was never recovered.

Much of the State's case relied on testimony from two witnesses: Dotson's girlfriend, L.H., who was with Dotson before and after the shooting, and R.M., who was shot and injured during the encounter.

A. Before the shooting, Essex and Dotson had a fight in which a witness saw Essex pull a gun on Dotson.

According to L.H., on the day of the shooting, Essex, Dotson, and L.H. were hanging out and driving around various locations in Milwaukee in Essex's white Cadillac Deville. (R. 141:8.) Essex and Dotson knew each other; Essex called Dotson a "close friend" whom he'd known for about 16 years. (R. 141:85.) Dotson's girlfriend, L.H., also knew Essex, describing him as a "close friend." (R. 141:23.) At some point, the trio picked up L.H.'s daughter, P.H., and went to a location at 39th Street and Meinecke Avenue, where Essex and Dotson got into a heated argument. (R. 141:14.)

L.H. testified that Dotson and Essex began physically fighting after Essex asked Dotson for gas money and Dotson refused. (R. 141:15.) L.H. said that Essex pulled out a semiautomatic gun and aimed it at Dotson. (R. 141:16–17.) When this happened, P.H. ran from the car and L.H. chased after her. (R. 141:16.) L.H. retrieved P.H., calmed her down, and returned to the two men, who had stopped fighting. (R. 141:17.) Essex then left, and L.H., P.H., and Dotson got a ride back to L.H.'s apartment. (R. 141:17–18.)

L.H. then realized she had left her phone in Essex's car; she asked Dotson to call Essex to ask him to check his back seat for her phone. (R. 141:18.) L.H. said that Dotson did so and told her that Essex found the phone and would drop it off. (R. 141:18.) According to L.H., Dotson remained outside the apartment to wait for Essex. (R. 141:18–19.) L.H. went to her apartment and, at one point, came back down to check on Dotson, who she said was talking on his cell phone

and waiting on the steps leading to the apartment. (R. 141:26.) When L.H. started returning to her apartment, R.M., another woman whom L.H. recognized from the building, was leaving. (R. 141:26.)

B. R.M. later saw Essex and another man arguing with Dotson, saw Essex with a gun, and heard numerous gunshots.

That woman, R.M., testified that on the night of the shooting, she was staying at her brother's apartment and went to the apartment building entrance twice to check to see if her nephew, whom she was expecting, had arrived. (R. 138:106.) The first time she went down, she stood inside the glass doors of the apartment entryway and could see Dotson sitting on the steps leading to the building, on his phone and drinking tequila. (R. 138:106–07.) She heard Dotson saying, "Yeah, I see your car, but where you at?" (R. 138:107.) She then saw a white four-door Cadillac coming up the street. It drew her attention because the headlights were off, and she imagined the police would likely stop the car for that. (R. 138:108.)

R.M. went back inside her brother's apartment and came back outside two to five minutes later. (R. 138:109.) When she stepped outside, she saw two African-American men walking toward Dotson from a white car parked across the street. (R. 138:109–10.) She said that one man had a darker complexion and dreadlocks, and the other had a light complexion and was older. (R. 138:110.) She identified Essex as the individual with the dreadlocks. (R. 138:111.)

According to R.M., the two men confronted Dotson about "some incident that had occurred earlier about touching him" and that Dotson "basically was saying he didn't mean for whatever . . . to have happened." (R. 138:111.) She said that Essex "was acting really . . . quiet but aggressive" and was in Dotson's face while the man with

Essex, whom she heard Essex call "Bee Bee," was "very angry" and "doing most of the talking" while pacing back and forth. (R. 138:112–13.) R.M. heard Bee Bee tell Dotson "he will lose tonight" and saw Bee Bee pull a handgun from his pocket. (R. 138:112.)

R.M. was "very scared" and heard Essex tell Bee Bee to "shut the F up and pass him . . . my shit." By that, she understood Essex to be telling Bee Bee to hand him the gun. (R. 138:113–14.) R.M., at this point, had been walking toward the men and moved through or around them to get to the street, where she turned left. (R. 138:114–15.) She described then feeling a "gush of hot wind go past my ear"; she turned around and saw Essex pointing the gun—the same gun she had just seen Bee Bee displaying—at her. (R. 138:115.) R.M. raised her arm, and Essex shot her in the elbow. (R. 138:115.) She then ran to a bus stop at a nearby intersection. (R. 138:116.) While she ran, she heard Essex "scream really loud 'Agh,' and he just shot, pow, pow, pow, pow, pow, pow, pow. And it just kept going. The shots just wouldn't stop." (R. 138:116.)

C. Both R.M. and L.H. saw Essex in his car immediately after the shooting.

When the shots were firing, L.H. was just inside the main apartment door and had not yet returned to her apartment. (R. 141:19, 26–27.) L.H. "dropped to the floor" and then jumped back up and ran outside. (R. 141:19.) She saw Dotson lying face down on the ground and grabbed him. (R. 141:19.) L.H. said that the shots were still firing when she started running out; she also described seeing two men in hoodies running to Essex's Cadillac, which was at the corner. (R. 141:20, 28–30.) She described seeing Essex inside the car in the driver's seat, "hitting the steering wheel with

his hands like this as though he knew he had done wrong."[1] (R. 141:20.)

In the meantime, an injured R.M. waited at the bus stop until a police officer arrived. (R. 138:117.) She pointed out to the officer the white Cadillac, which she said the men returned to and which had been circling the block. (R. 138:117.) At that point, the Cadillac was moving eastbound down a nearby street, Highland; it continued in that direction and did not return. (R. 138:69–70, 117.)

The officer who made contact with R.M. testified that R.M. was agitated and bleeding from her right arm. She told him that the two men in the Cadillac shot her and Dotson—whose name she did not know but whom she had seen at the apartment building before—after an argument. (R. 138:73–74.) The officer thought that the first three characters on the license plate of the Cadillac that R.M. had identified were 373. (R. 138:66, 70.) That encounter was captured on the officer's body camera, and the State played portions of it for the jury. (R. 138:70.)

R.M. testified that she had never met Essex or Bee Bee before. (R. 138:116–17.) In December 2015, R.M. looked at a photo array and identified Essex as the man who shot her. (R. 138:119–21.) That same day, she identified in another photo array the man who initially had the gun and whom she heard Essex call "Bee Bee." (R. 70:2; 138:123.) When shown a different photo of that man, L.H. recognized him as Essex's "cousin or uncle." (R. 141:7.) At trial, Essex clarified that the man was named Arthur Alexander, he was his "cousin's daddy," and that his nickname was Bee Bee. (R. 75:1; 141:104.)

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[1] Although the parties did not clarify L.H.'s testimony at the time, during closing argument, the prosecutor characterized L.H. as having seen Essex "slamming [the] steering wheel." (R. 140:46.)

Police later found Essex's Cadillac, which had a license plate beginning with the numbers 323, at the home where the mother of some of Essex's children lived. (R. 139:30–34.) Inside the car, police found a citation made out to Essex on the driver's side of the car and a gun holster in the trunk. (R. 139:34–37.) Police apprehended and arrested Essex in November 2015, after finding him hiding in the attic of a residence where Alexander was also present. (R. 141:74–76.)

Police also responded to the scene, where they found Dotson facedown on the ground; he died shortly thereafter. (R. 138:58–59.) He had no weapons on him and had been shot seven times. (R. 138:59.) The police recovered ten spent casings under and around Dotson's body, which a detective testified indicated that the shooter used a semiautomatic gun. (R. 138:89–90, 98.) A crime lab analyst was able to determine that all ten casings had been ejected by the same gun. (R. 141:65.)

D. The State admitted evidence of other casings found in Essex's car to link him to the murder weapon.

The State also admitted evidence that in May 2015, Essex was shot during a drive-by attack and hospitalized as a result. (R. 141:33.) In investigating that shooting, Essex told police that he was in his Cadillac along with two women; Essex said that he was sitting in the rear driver's side seat when a car pulled up and began shooting. (R. 141:33–34.) Essex told police that he had no gun. (R. 141:34.)

After obtaining consent from Essex to search his car, police found that Essex's car had been shot 17 times. (R. 141:34.) Inside the car, police recovered seven 9mm casings; based on their locations, they had been likely discharged from a weapon fired by a person in the back seat of Essex's car. (R. 141:45.) The State's firearms expert

testified that he examined the seven casings recovered from Essex's car in May 2015 and the ten casings from Dotson's murder in October 2015, and that he was able to determine that all 17 casings were discharged by the same gun. (R. 141:69.)

E. Essex denied pulling a gun on Dotson or being present when Dotson was shot.

Essex testified. As for the events leading up to the physical fight between him and Dotson at 39th and Meinecke, his testimony largely echoed L.H.'s. (R. 141:83–90.) According to Essex, he dropped off Dotson and the others at 39th and Meinecke, at which point Dotson got angry at Essex and took his car keys. (R. 141:91.) Essex claimed he got out and they argued; he said that Dotson "grabbed" him but he did not fight back, because they were near Dotson's family and he felt outnumbered. (R. 141:91–92, 104.) Essex denied pulling a gun on Dotson. (R. 141:92, 102.)

Essex said that after Dotson returned the keys to him, Essex then drove away and went to his son's football practice until about 8:20 p.m. (R. 141:92–93.) Essex said that Dotson called asking about L.H.'s cell phone, but Essex denied that he ever found it. (R. 141:92.) According to Essex, after his son's practice, he took his son home, got a call from a friend, and left to meet up with that friend. (R. 141:93.) He claimed he got a call about Dotson's shooting later that night and drove by the scene to see what happened, but he did not stop. (R. 141:93–94.)

As for the May 2015 shooting, he denied having fired a gun at the shooter who attacked him; he claimed to have only "ducked" in his car. (R. 141:95–98.) He also claimed that a fourth person—another man who was friends with one of the women in the car—was in the car at the time of the

shooting and "guess[ed] he was the one firing back." (R. 141:98.) When the State asked why Essex, when he originally talked to police about the incident, never told them of this other man in the car, Essex said he did not want to get the man in trouble, even though the man was seemingly shooting in self-defense. (R. 141:106.) Essex also claimed to have loaned his Cadillac to this man a few times, but would not give his name, eventually stating that he knew him by the name "Mike." (R. 141:107–08, 112.) Essex denied, however, loaning the Cadillac to "Mike" on the day Dotson was killed. (R. 141:109.)

The jury found Essex guilty of both the felon in possession and the first-degree reckless homicide as party to a crime counts. (R. 114; 142:2–3.) The court sentenced him to consecutive sentences totaling 35 years' initial confinement and 15 years' extended supervision. (R. 114:1.)

II. Relevant procedural background

Pretrial, the State sought permission to use the evidence of the casings found in Essex's car in May 2015 and the analyst's report opining that they were discharged from the same weapon that killed Dotson. (R. 16.) In the State's view, the evidence was direct evidence that Essex possessed the murder weapon. Alternatively, it argued that it was admissible other-act evidence going to identity and absence of mistake.

The circuit court held a hearing on the motion.[2] It agreed that the evidence was "highly relevant" for identification purposes. (R. 131:14.) And "in many ways, [it] agree[d] [that] it is direct evidence." (R. 131:14.) But it acknowledged that "[i]n some ways . . . it does fall under the

[2] The Honorable Ellen R. Brostrom presided over the motion hearing. The Honorable Jeffrey Wagner presided over the trial.

other acts evidence" because Essex was a felon at the time of the May 2015 shooting and hence, should not have had a gun in his car at that point. (R. 131:14.) In any event, however, it held that it was highly relevant "to identity." (R. 131:14.) It also explained that its "prejudicial effect is relatively limited," and said that that effect could be limited further if the parties preferred to stipulate or narrow the facts presented or to have the court give the jury a limiting instruction. (R. 131:14–15.)

On appeal, Essex challenges the court's admission of that evidence.

STANDARD OF REVIEW

This Court defers to a circuit court's discretionary decision to admit evidence; moreover, it will sustain an evidentiary ruling if "it finds that the circuit court examined the relevant facts; applied a proper standard of law; and using a demonstrative rational process, reached a conclusion that a reasonable judge could reach." *State v. Sullivan*, 216 Wis. 2d 768, 780–81, 576 N.W.2d 30 (1998). If the circuit court does not fully exercise its discretion, this Court will uphold the circuit court's decision if the record contains facts that would support a proper and full exercise of discretion. *Id.* at 781.

ARGUMENT

The circuit court soundly exercised its discretion in allowing the State to use the evidence from the May 2015 incident.

The evidence—i.e., the casings found in Essex's car in May 2015 and the report that they were discharged from the same weapon that killed Dotson—was admissible direct evidence connecting Essex to the murder weapon. Accordingly, it is not other-act evidence; the circuit court soundly held that it was relevant and not unduly prejudicial

under the circumstances. Alternatively, if the evidence qualifies as other-act evidence, it satisfies Wis. Stat. § 904.04(2) and the *Sullivan* test for admissibility. Finally, in light of the overwhelming circumstantial evidence that Essex was guilty of both counts, even without the evidence, any error in the court's admitting the evidence was harmless. Essex is not entitled to relief, and this Court should affirm.

A. Legal standards regarding admissibility of direct and other-act evidence

Admissibility of evidence generally. Relevance is defined 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." Wis. Stat. § 904.01. The proposition for which the evidence is offered must be of consequence to the determination of the action and must have probative value when offered for that purpose. *State v. Payano*, 2009 WI 86, ¶ 68, 320 Wis. 2d 348, 768 N.W.2d 832. "To be relevant, evidence does not have to determine a fact at issue conclusively; the evidence needs only to make the fact more probable than it would be without the evidence." *State v. Hartman*, 145 Wis. 2d 1, 14, 426 N.W.2d 320 (1988).

Evidence is not admissible unless it is relevant. Wis. Stat. § 904.02. But a circuit court may exclude relevant evidence "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." Wis. Stat. § 904.03.

Admissibility of other-act evidence. Wisconsin Stat. § 904.04(2) permits the introduction of other-act evidence. Courts apply a three-step analysis to determine the

admissibility of "other acts." *Sullivan*, 216 Wis. 2d at 771–73.

First, the evidence must be offered for an admissible purpose under section 904.04(2), such as to establish motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident, although this list is not exhaustive or exclusive. *Id.* at 772. Second, the evidence must be relevant, which means it must both be of consequence to the determination of the action, and must also have a tendency to make a consequential fact or proposition more probable or less probable than it would be without the evidence. *Id.* at 772. Third, the probative value of the other-act evidence must not be substantially outweighed by the considerations set forth in section 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. *Id.* at 772–73.

A different act is not necessarily an "other act." This Court has cautioned: "[S]imply because an act can be factually classified as 'different'—in time, place and, perhaps, manner than the act complained of—that different act is not necessarily 'other acts' evidence in the eyes of the law." *State v. Bauer*, 2000 WI App 206, ¶ 7 n.2, 238 Wis. 2d 687, 617 N.W.2d 902 (evidence of a subsequent solicitation to commit homicide of the victim and a witness was not an other act in the defendant's trial for attempted first-degree intentional homicide, as it revealed his consciousness of guilt on the charged offense). Evidence that relates directly to an element of the crime or that directly supports a theory of defense is not other-act evidence. *See State v. Johnson*, 184 Wis. 2d 324, 349, 516 N.W.2d 463 (Ct. App. 1994) (Anderson, J., concurring) (other act involving victim's taking of defendant's property supports defense theory that victim fabricated assault to gain access to property).

Likewise,"[e]vidence is not 'other acts' evidence if it is part of the panorama of evidence needed to completely describe the crime that occurred and is thereby inextricably intertwined with the crime." *State v. Dukes*, 2007 WI App 175, ¶ 28, 303 Wis. 2d 208, 736 N.W.2d 515.

Harmless error. Even if a court erroneously admits other-act evidence, that decision is subject to harmless error analysis. *See State v. Lock*, 2012 WI App 99, ¶ 42, 344 Wis. 2d 166, 823 N.W.2d 378 (citation omitted). "The test for harmless error is whether there is a reasonable possibility that the error contributed to the conviction." *Id.* (citation omitted).

B. The evidence was admissible direct evidence connecting Essex to the murder weapon.

As an initial matter, the evidence the State introduced of the casings found in Essex's car and the fact that they were discharged from the same gun that killed Dotson were not other "acts." The jury heard that casings were found in Essex's car, that they had to have come from a gun that someone shot from inside the car, and that they and the casings found at Dotson's murder scene were discharged from the same gun. The State alleged no specific other "act"—such as that Essex shot the gun in May 2015—that makes this other-act evidence.

Rather, the casings and expert testimony and report went to proving direct elements of the crimes. Specifically, Essex was charged with first-degree reckless homicide by use of a dangerous weapon as a party to crime. Evidence that the gun used to kill Dotson had been inside Essex's car five months earlier was relevant to prove that Essex caused Dotson's death directly—or aided and abetted Dotson's shooting death—with that same gun. Moreover, evidence that the gun was inside Essex's car in May 2015 was

relevant to prove an element of felon in possession, i.e., that Essex possessed the gun that L.H. saw him grab in his car and pull on Dotson.

Because the evidence of the casings found in May 2015 in Essex's car is direct evidence, it was admissible if it was relevant and its probative value was not substantially outweighed by the danger of unfair prejudice. Wis. Stat. §§ 904.01 and 904.03.

Section 904.01 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." Here, the identity of the gunman responsible for shooting Terry Dotson is undeniably a "fact that is of consequence to the determination of the action." The shell casings found in May 2015 and the corresponding expert testimony were relevant because the ammunition that left the casings was fired from the murder weapon.

Further, evidence that casings discharged by a particular gun were found in Essex's car five months earlier was relevant to connect Essex to Dotson's murder by the same weapon. "Evidence is relevant when it is persuasive or indicative that a fact in controversy did or did not exist because the conclusion in question may be logically inferred from the evidence." *Hicks v. State*, 47 Wis. 2d 38, 43, 176 N.W.2d 386 (1970) (quoting 1 Wharton's, Anderson, *Criminal Evidence* § 148, at 284–87 (12th ed.)). In all, "any fact which tends to prove a material issue is relevant, even though it is only a link in the chain of facts which must be proved to make the proposition at issue appear more or less probable." *Id.* (quoting same). "Relevancy is not determined by resemblance to, but by the connection with, other facts." *Id.* (quoting same).

Here, evidence that casings discharged inside Essex's car in May were linked to the gun that fired the fatal shots at Dotson in October, is "'a link in the chain of facts which must be proved to make the proposition at issue [here, the proposition that Essex was one of the gunmen] appear more or less probable.'" *Hicks*, 47 Wis. 2d at 43 (quoting Wharton's *Criminal Evidence*). Both the casings and the expert testimony constituted links in a circumstantial chain of evidence connecting Essex to the homicide by means of the murder weapon. They satisfy the definition of relevance in section 904.01.

The remaining question is whether the trial court correctly exercised its discretion in finding that the evidence was not excludible under section 904.03. Under that statute, relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice." Unfair prejudice can result where the evidence "would have 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. Mordica*, 168 Wis. 2d 593, 605, 484 N.W.2d 352 (Ct. App. 1992). In other words, "unfair prejudice means a tendency to influence the outcome by *improper* means." *Id.* (citation omitted).

The State's presentation of the casings and expert testimony was not unfairly prejudicial. It presented testimony from a detective that investigated the May 2015 crime in which Essex was the victim, i.e., a report that another car had shot into Essex's Cadillac, wounding Essex. (R. 141:32–33.) The detective explained that he obtained consent from Essex to search his vehicle, where he found the casings. (R. 141:35.) The detective stated that Essex claimed to have been in the back seat driver's side of the car; he denied returning fire or having a gun in the car. (R. 141:34,

37.) The detective further testified that even if Essex had returned the fire, however, he would have been shooting in self-defense. (R. 141:37.)

Another detective testified that the location of the casings was consistent with their having been discharged from someone firing a gun from the rear seat inside the car. (R. 141:45–46.) Finally, the State's firearms expert testified that the casings found in Essex's car and those found at Dotson's murder scene were discharged by the same gun. (R. 141:69.)

What was *not* part of the State's evidence was that police found the gun or that Essex shot it in May 2015. The absence of those facts limited the prejudicial effect of the evidence. In other words, if the jury inferred that the bullet casings found in Essex's car in May 2015 meant that Essex possessed or had access to the gun that discharged those casings, the evidence had high probative value outweighing any prejudicial effect. If it did not so infer, there was no prejudicial effect. But in any event, the admission of the evidence was within the circuit court's discretion; it properly exercised that discretion under the circumstances.

Essex does not address the State's argument that the evidence was direct evidence, other than to note that "there was no direct evidence to show that Mr. Essex had a gun or shot a gun that day [in May]." (Essex's Br. 11.) But the evidence was direct evidence of the homicide and possession charges from October, not of any crime he committed in May. To that end, he disregards that the evidence was simply placing in Essex's car a gun, which L.H. saw Essex pull on Dotson at 39th and Meinecke and which formed the basis of the felon-in-possession charge, and more specifically, the gun used to kill Dotson, thus linking Essex to Dotson's murder as at least a party to the crime. Hence, the State did not need to prove that Essex actually shot the gun in May

2015; it was just placing the gun in his car and, by extension, his control.

In sum, the evidence the State presented regarding the May 2015 incident—in which Essex was the victim of a drive-by shooting, and during the investigation of which police found evidence connecting Essex to the weapon used to kill Dotson five months later—was direct evidence of the crimes related to Dotson's killing. It was highly relevant to linking Essex to the murder, and its probative value was not outweighed by the risk of unfair prejudice under the circumstances. The circuit court's exercise of discretion in admitting it was sound.

C. Alternatively, the evidence was admissible under the other-act test.

Even if the evidence of the May 2015 shooting is other-act evidence, it satisfied *Sullivan*'s three-part test.

First, the State offered the evidence for a permissible purpose under section 904.04(2) to establish Essex's identity as one of the men involved in Dotson's killing. *Sullivan*, 216 Wis. 2d at 772. Second, as explained above, the evidence was relevant to prove Essex's identity as either Dotson's shooter or someone who aided and abetted the shooter. Essex does not argue otherwise on appeal; indeed, at the motion hearing on the issue, Essex conceded that the State was admitting the evidence for identity, that it was a permissible purpose, and that the evidence was relevant to that purpose. (R. 131:9–10.) Third, as discussed above, the probative value of the evidence was high, and the risk of unfair prejudice was low. The circuit court's exercise of discretion in admitting the evidence is sound.

Essex focuses on the third prong of *Sullivan*, asserting that the probative value of the evidence was substantially outweighed by 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. *See Sullivan*, 216 Wis. 2d at 772–73. (Essex's Br. 13–15.) He argues that the State could not prove that Essex possessed the murder weapon in May 2015, given his denials that he had a gun or returned fire, and given that police did not recover a gun from his car. (Essex's Br. 13.) But Essex cannot deny that the casings were found in his vehicle and that they were shot by the murder weapon. Accordingly, Essex at some point had access to the murder weapon because it had been in his car. That inference made it less likely that L.H. and R.M. misidentified Essex's Cadillac or Essex as one of the two men they saw immediately before and after Dotson's shooting.

And *State v. Hereford*, 195 Wis. 2d 1054, 1068, 537 N.W.2d 62 (Ct. App. 1995), does not assist Essex. (Essex's Br. 13–14.) In *Hereford*, this Court affirmed the circuit court's admission of evidence that three weeks before the homicide in that case, Hereford had a gun in his car similar to the one used to shoot the victim. *Id.* at 1068. The Court held that the evidence was admissible and relevant to show means, intent, and context. *Id.* at 1068–69. It finally held that its probative value was not substantially outweighed by the risk of unfair prejudice. In so holding, it wrote that "the critical inquiry here is to what degree did [the evidence] have the potential to influence the jury by an improper means—the suggestion that because there was a gun under the seat of Hereford's car within three weeks of the shooting, Hereford must have shot [the victim]." *Id.* at 1071. Under the circumstances, "the trial court could reasonably conclude that the potential for the jury to make this assumption is not so great as to outweigh the probative value of [the evidence]." *Id.* 1070–71.

Applying that rationale here, Essex cannot show that the evidence that he was involved in a shooting in May 2015 necessarily compelled the jury to find that he shot Dotson in

October 2015. Further, to the extent Essex complains that the court did not provide a limiting instruction to cure any prejudice (Essex's Br. 14), he has no one to blame but himself, given that he did not ask for such an instruction. *See Payano*, 320 Wis. 2d 348, ¶ 100 (noting that although cautionary jury instructions are preferred when other-act evidence is admitted, "they are not required unless requested").

Similarly, Essex cannot reasonably complain that the State or court did not reasonably narrow the scope of the evidence admitted to reduce the risk of prejudice. Before the motion hearing, the State suggested to Essex that they might enter a stipulation along the lines that "there was an instance in which [Essex] was in the hospital. His car was located. Inside his car were these casings." (R. 131:7.) Essex refused that invitation; moreover, he did not seek to so limit the State's evidence after the court ruled that it was admissible, but told Essex that it would grant any requests for a stripped-down stipulation. (R. 131:15.)

In all, the circuit court soundly determined that the risk was low that the jury would infer from evidence that Essex was the victim of a drive-by shooting necessarily meant that he was involved in shooting Dotson five months later. Essex is not entitled to relief.

D. Any error was harmless.

Finally, while this Court need not reach harmless error, the record demonstrates that even without the evidence of the casings found after the May 2015 incident and their connection to the murder weapon, the jury would have convicted Essex of the crimes. *See Lock*, 344 Wis. 2d 166, ¶ 42. The State presented significant circumstantial evidence that Essex shot Dotson.

R.M. was shot during the encounter; she had no connection to Dotson other than having seen him in her building. She did not know Essex or Alexander. She saw the argument leading to Dotson's shooting, saw Alexander display a gun to Dotson, heard Essex tell Alexander to "pass me my shit," saw Essex point the gun at her, saw him shoot her, and heard the immediate stream of gunshots that followed. Before and after the shooting, she saw and identified the white Cadillac that Essex was driving. After the shooting, she identified by photo array Essex as the shooter and Alexander, who was Essex's relative (and again, whom she had never met before), as the man accompanying him.

L.H. testified that Essex and Dotson had words and a physical fight shortly before Dotson was shot. During that altercation, she saw Essex pull a semiautomatic gun on Dotson. She testified that Dotson had been waiting for Essex outside the apartment building just before the shooting. After the shooting, she saw Essex, whom she knew and whom she then considered a friend, in his car across the street after the shooting.

Neither R.M. nor L.H. had motive or incentive to lie during the trial. To be sure, R.M. had a long arrest and conviction record and had given a false name when she first encountered the police, but she explained that she was not receiving any benefit from the State in her past or pending cases for testifying. Moreover, she did not know Dotson personally, nor had she ever met Essex or Alexander and had no apparent motivation to convict either of them while the person who actually shot her remained free. Further, L.H. knew Essex and had been friends with him; she had no apparent reason to testify against him while Dotson's real killer remained free. And when asked, L.H. agreed that she did not want to be a witness at the trial.

Moreover, police testified that they located the car that R.M. pointed out to police on the night of the shooting at the home of someone associated with Essex. They arrested Essex after executing a warrant and retrieving him from an attic space in a residence where Alexander was also present.

Finally, Essex's defense was that he was at his son's football game or practice when Dotson was killed, but he did not corroborate that assertion with any other testimony. Nor could he explain why his car was at the murder scene, why his uncle was there, or why a man who looked like him was with his uncle and using his car while confronting the man with whom he had fought earlier that day.

In all, the State had a well-secured case to convict Essex. The evidence that the same gun used to kill Dotson had been in Essex's car five months earlier was simply additional evidence implying that Essex was involved in Dotson's shooting. Given the significant and strong circumstantial evidence that Essex shot Dotson, the jury still would have convicted Essex without it.

In sum, the court properly admitted the evidence of the casings police had previously found in Essex's car and the fact that they came from the same gun that killed Dotson. That was direct evidence linking Essex to the crimes of felon-in-possession, based on his pulling a gun on Dotson before the murder, and first-degree reckless homicide as a party to a crime, for his involvement with Alexander in Dotson's shooting death. Alternatively, if it is other-act evidence, it satisfies *Sullivan*. Finally, any error in admitting it was harmless. This Court should affirm.

CONCLUSION

This Court should affirm the judgment of conviction.

Dated this 25th day of January, 2018.

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 6298 words.

_____
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I hereby certify that:

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This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

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Dated this 25th day of January, 2018.

_____
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