STATE OF WISCONSIN

C O U R T OF A P P E A L S

DISTRICT I

STATE OF WISCONSIN,

Plaintiff-Respondent,

v. No. 2018 AP 952-CR

ALBERTO E. RIVERA,

Defendant-Appellant.

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

APPELLANT'S REPLY BRIEF

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Discussion

1. Other Acts

a. Similarity

In its treatment of the second prong of the analysis mandated by *State v. Sullivan*, 216 Wis.2d 765, 576 N.W.2d 30 (1998), the State claims: "Against that background, the circuit court soundly determined that there was 'a concurrence of common features' between the two crimes. See *Fishnick*, 127 Wis.2d at 263-264." Respondent's Brief at 10 (end of 2d ¶), hereinafter RB.

First of all, the court below's ruling on the second step was quite the contrary to the State's claim. See (14:2-3) in Appellant's Appendix at 7-8. The court

found "the second prong is *not met*: the relevance of the 1997 homicide to any of the Sullivan purposes is limited because the similar facts are *highly generic*." *Id.*, emphasis added. Furthermore, the quotation from *State v. Fishnick*, 127 Wis.2d 247, 263-264 (1986) is extremely selective. The entirety of the quotation is: "there should be such a concurrence of common features and so many point of similarity between the other acts and the crime charged that it can reasonably be said that the other acts and the present act constitute the *imprint of the defendant*." 127 Wis.2d at 263-264, emphasis added. The court below applied this test and found "the only 'signature' facts . . . are distinguishing factors." (14:3).

So the State's argument on this point is completely contrary to the facts and the law.

b. Prejudice

At RB 10-11, the State again makes a claim belied by the record. On the third step of the *Sullivan* analysis, the court below quite clearly found "the probative value is substantially outweighed by the danger of unfair prejudice . . . " (14:3). The circuit court was so concerned about this prejudice it did not believe any "curative jury instruction . . . will cure the danger of unfair prejudice" because "[a] prior conviction for homicide is too inflammatory." *Id.* Thus, the State's argument on this point as well is completely erroneous.

c. Admission as rebuttal evidence

Finally getting to the real issue here, *i.e.*, whether other acts evidence found inadmissible in the State's case-in-chief is nevertheless admissible in rebuttal, the State claims *State v. Sonnenberg*, 117 Wis.2d 159, 169-174 (1984), cited in Appellant's Brief at 5, hereinafter AB, is not in point. RB 12. That is for this Court to decide, but counsel notes the point is

the admissibility of other acts evidence in rebuttal is judged by the same rules as for admissibility in the case-in-chief. See, *e.g.*, *King v. State*, 75 Wis.2d 26 (1977)(basic other acts rules applied to deciding whether such evidence was admissible in rebuttal), cited AB 5. Counsel further notes the State cites no case holding otherwise.

d. Harmless error

The State presents no developed argument on this issue, claiming it is not necessary because the admission of the evidence in rebuttal passed the third step of the *Sullivan* analysis. RB 12. As already noted, *supra,* 1b., the court below found the admission of other acts here failed the third step of the *Sullivan* analysis because "A prior conviction for homicide is too inflammatory." (14:3). Evidence of the 18 year old homicide is just as inflammatory when presented in rebuttal. Thus, the State has failed its burden to show "no reasonable possibility that the error contributed to the conviction," *State v. Dyess*, 125 Wis.2d 525, 543 (1985), and the conviction should be reversed on this ground alone.

(Counsel notes the State presents no argument the error was waived by Mr. Rivera's testimony. Counsel assumes this is because the State knows that the rule is: where an accused objects to prejudicial evidence, the objection is not waived if trail counsel tries to minimize the prejudice by bringing it up first. See *State v. Gary M. B.*, 2003 WI 33, ¶18, 270 Wis.2d 62 and (225:131-134 [counsel and Mr. Rivera decided he would testify preemptively]).

2. Sufficiency

Apparently conceding the evidence did not prove Mr. Rivera was the person who shot the victims, the State asserts, without pointing to any specific facts, this doesn't matter because he was also

charged as a party to the crime and "the evidence was more than sufficient" to convince the jury he was an aider and abettor. RB 14. Counsel disputes this and submits there is no evidence of the second element of aiding and abetting, *i.e.*, that Mr. Rivera "consciously desire[d] or intend[ed] that his conduct" would assist in the commission of the crime. *State v. Asfoor,* 75 Wis.2d 411, 427, 249 N.W.2d 529 (1977).

Conclusion

Counsel respectfully submits the State's arguments are without merit and the Court should reverse the court below.

Dated: October 14, 2018 Respectfully submitted,

_____

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CERTIFICATIONS

FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in §809.19(8)(b) & (c) for a brief produced with a proportional serif font.

The length of this brief is 833 words.

ACCURACY CERTIFICATION

I hereby certify that the electronic copy of this brief conforms to the rule contained §809.19(12)(f) in that the text of the electronic copy of this brief is identical to the text of the paper copy of this brief.

MAILING

I certify that this brief was deposited in the United States mail for delivery to the Clerk of the Court of Appeals by first class mail on October 16, 2018. I further certify that the brief was correctly addressed and postage was prepaid.

Dated: October 16, 2018 So Certified,

Signature: _____

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