STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2018AP002325-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

PEDRO R. MENDOZA III,

Defendant-Appellant.

On Appeal from a Judgment of Conviction and from an Order Denying Postconviction Motion In Part, Entered in the Milwaukee County Circuit Court, the Honorable Thomas J. McAdams Presiding

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BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUES PRESENTED

1. Was trial counsel ineffective when he failed to contemporaneously object to the State's repeated references to Mr. Mendoza's former affiliation with the Latin Kings during voir dire?

The circuit court held that presentation of the gang evidence was not prejudicial, and therefore, trial counsel was not ineffective for failing to object during voir dire.

2. Was trial counsel ineffective when he failed to present material other acts and character evidence related to H.V. and M.C.M. that called into question the credibility of their testimony and the State's assertions that H.V. and M.C.M. were reluctant witnesses because they feared Mr. Mendoza?

The circuit court concluded that trial counsel was not ineffective because this evidence would not have been admissible at trial, and even if it was, failure to present the evidence it was not prejudicial because it would only serve to make H.V. and M.C.M. look more sympathetic and show that Mr. Mendoza grew up with people who had problems. (135:25-26).

3. Was trial counsel ineffective when he failed to present expert comparison testimony regarding post-traumatic stress disorder highly relevant

to the subjective factors outlined in the test for self-defense?

The circuit court concluded that the evidence regarding Mr. Mendoza's post-traumatic stress disorder diagnosis and combat experience would not have been helpful to his claim of self-defense, and while trial counsel did not say he did not pursue this defense because of a strategic decision, the court held that declining to hire an expert in this situation was a reasonable strategic choice. Thus, the court found that trial counsel was not ineffective.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Mr. Mendoza welcomes oral argument on this issue if the court would find it helpful to deciding the question posed by this appeal. This matter involves the application of well-established legal principles, and therefore, publication is not necessary.

STATEMENT OF FACTS

May 4, 2014 Shooting

In the early morning of Sunday, May 4, 2014, a shooting occurred outside of Grady's Saloon on West Lincoln Avenue in the City of Milwaukee. (1). Mr. Mendoza, a CCW permit holder who turned himself into the police department to report his participation in the shooting, fired his gun into the rear end of a vehicle occupied by H.V. (driver's seat) and M.C.M.

(front passenger seat). (1). Mr. Mendoza left the scene in the car of his girlfriend, Samantha Hembrooke, and H.V. and M.C.M. also drove off. (1). As he was leaving the scene, H.V. drove past a squad car that was heading to the scene. The squad car turned around and followed H.V. briefly, but was called away to attend to the scene of the shooting. (1). After several minutes, H.V. and M.C.M. returned to the scene of the shooting. (1).

When H.V. and M.C.M. met with police, neither identified Mr. Mendoza as the shooter. (1:2). H.V. told the officers that he knew the individual, but declined to identify him. (1:2). M.C.M. told police she didn't know the shooter, but provided a description of his appearance and the clothing he was wearing. (1:2). Around 5:00 p.m. that same day, Mr. Mendoza went to the police department, carrying with him the gun he used in the shooting. He told police that he was there to report his involvement in the incident, and was interviewed by Detective Jason Enk as a result. (1:2).

During this initial interview, Detective Enk asked Mr. Mendoza about his relationship with H.V. and whether H.V. was still "banging" – whether he was still involved with the Latin Kings. (116:Trial Exhibit 30). This conversation occurred during the last few minutes of the first interview in which Mr. Mendoza explained that he saw H.V. around from time to time and they don't have any problem with one another. He said that he didn't know H.V.'s status with the Latin Kings, as he personally had

been out of the gang for more than twenty years, following the birth of his first son. (116:Trial Exhibit 30).

He explained to the detective that since that time, he was married, had a family, enrolled in the U.S. Army after the 9/11 attacks, and worked as an auto mechanic after he was discharged. (116:Trial Exhibit 30). Mr. Mendoza explained that he had acted in self-defense, believing H.V. pulled a gun out on him and fired in his direction from the inside of his vehicle before he returned fire. (116:Trial Exhibit 30).

Months after turning himself in, Mr. Mendoza was officially charged with first-degree recklessly endangering safety, contrary to Wis. Stat. §941.30(1), and endangering safety by use of a dangerous weapon by discharging a firearm into a vehicle, contrary to Wis. Stat. §941.20(2)(a). Mr. Mendoza maintained that he had acted solely in self-defense and declined all pretrial offers and the matter proceeded to trial.

In the months that followed, Detective Enk independently developed a theory that the shooting between H.V. and Mr. Mendoza must have been related to H.V.'s work as an informant during a crackdown on the Latin Kings in the 1990s, as Mr. Mendoza admitted to the detective that he was a member of the gang as a young man and around that time. (16).

State's Motion to Admit Gang Evidence

Shortly before trial, the State filed a motion with the court seeking to introduce evidence of Mr. Mendoza and H.V.'s prior affiliation with the Latin Kings. (16). The State also sought permission to permit an expert to testify about the general habits of members of the Latin Kings and a history of the Kings' criminal enterprise. (16). In that motion, the State alleged "Pedro Mendoza and [H.V.] are affiliated with the Latin Kings and have **pled guilty to federal charges related to their involvement in the Latin King criminal enterprise**." (15:3) (emphasis in the original). This assertion was untrue, as the Pedro Mendoza involved in the federal indictment was another man by the same name. Notably, Mr. Mendoza was never indicted or involved in the federal investigation of the Latin Kings occurring in the late 1990s. (126:9). The State's motion asserted H.V. was at one time the "Inca" or leader of the Latin Kings, and as a result, was indicted with 32 criminal counts in federal court. (15). H.V. cooperated in the investigation in exchange for a substantial deal, and ultimately pled guilty to only two counts. (15). He was sentenced to ten years in federal prison as a result. (15).

The defense responded to that filing in writing, submitting a brief seeking the exclusion of Mr. Mendoza and H.V.'s affiliation to the Latin Kings, as well as asking that the court deny the State's request to admit the expert testimony. (21). The defense argued that this testimony and the other acts

evidence was irrelevant to the question at hand – whether Mr. Mendoza acted in self-defense when he fired at H.V. (21).

The State's request was addressed both formally and informally during the course of multiple hearings leading up to the trial. On January 29, 2015, the State's motion was brought to the court's attention by trial counsel, who asked that the court set the matter for a *Daubert*[1] hearing. (124). The court noted that it not really a *Daubert* issue, but rather one regarding the admissibility of character evidence. (124:5). The court then adjourned the matter to April 13, 2015 for a motion hearing and set the trial date as May 11, 2015. (124:7). On April 13, 2015, the motion hearing was adjourned without argument.

The next discussion of the other acts motion occurred on May 1, 2015. Prior to going on the record, an in-chambers conference between the parties was held and it was at that time that the court apparently received information and argument on the motion. (125:2). The court noted that it was taking the motion under advisement and scheduled the matter for another hearing date for further information. (125:2). The next hearing occurred on May 8, 2015.

At that time, the State stated, "our last discussion was kind of a let's see what the individuals will testify to and we'll go from there." (126:2). The

[1] *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

defense argued that it would be best to have a ruling on the State's motion and emphasized that Mr. Mendoza was asking that the court exclude evidence of the gang affiliation, as well as the testimony. (126:3-4). The court soon interjected, stating, "But either way, the background comes in." (126:5). The court continued, explaining that decisions about the gang evidence were going to have to wait so that the court could see what was going to come in through the witnesses at trial. (126:5-6).

Prior to the start of trial on May 11, 2015. defense counsel stated he had the "concern" that "Ms. Kolberg [the prosecutor][was] going to tell the jury that both H.V. and Mr. Mendoza some 20 years ago were involved in the Latin Kings." (127:4). The State responded by saying that the fact of Mr. Mendoza's prior gang affiliation was going to come in through the playing of his statement, arguing "I have a right to explain the relationship between these two people." (127:6-7). Neither the court nor defense counsel responded to that statement, and the jury panel was called to court after the break. No final ruling was made on the admissibility of gang evidence at that time. (127).

Presentation of Gang Affiliation During Voir Dire

During voir dire, the State discussed gang affiliation with the jury, asserting several times that witnesses would testify who feared for their safety due to their cooperation with the case, and implying

that testifying against Mr. Mendoza was a dangerous endeavor:

> State: Ok. We're going to hear in this case that the victim, the victim and the Defendant, have an affiliation with the Latin Kings street gang and that there are witnesses who are going to be afraid to be here. Hearing that, is there anyone in the group who has concerns about the fact that we may be hearing from some dangerous people?
>
> Juror: Just the fact that, you know, when you announce here where you live, your names, your family members, and then you're talking about street gangs so obviously then it's common knowledge.
>
> State: Does anyone have concerns like Juror Number 24, concerned now that they've said their name and where they live? (Jurors nod.)
>
> Juror: That's a very valid point.
>
> State: So we had some nods in the group in response to that.

(127:35:13-19; 127:36:1-11).

> State: Ok. I want to kind of jump back to this question that we were talking about a little earlier. We're going to hear from the witnesses who don't want to be here. They're concerned about their safety and what's going to happen. Is there anyone here that doesn't understand the people on the stand are under a lot of pressure when they're here? And that it can be a stressful situation for them and that it's a human reaction

> not to want to point fingers at other people if they're concerned for their safety?
>
> (Jurors nod.)
>
> State: Seeing some head nods. I have nothing further. Thank you, Judge.

(127:38:9-21).

Defense counsel did not object to the State's line of questioning or move for a mistrial or new jury panel at any time during jury selection. Instead, defense counsel attempted to rehabilitate the jury.

> Defense Counsel: I'm a little concerned about the manner in which you were told about the fact that some people are – Some people who you're going to hear about in this case are dangerous. Is there anybody who just having heard that there's some gang affiliation and that there's dangerous people involved that feel now that you just can't sit on this jury and be fair to both sides?
>
> Juror: I don't feel comfortable.
>
> Defense Counsel: What if you heard there's going to be evidence that shows that the affiliation that was referred to in terms of gang relationship is more than 20 years ago? Would that make it different for you?
>
> Juror: No. Just because the life-style and things that, you know, my upbringing is such so couldn't change anything.

> Defense Counsel: Ok. So just the statement made by the district attorney to the effect that there's going to be dangerous people or there's going to be issues about dangerous people, that already has caused you to feel uncomfortable in this case?
>
> Juror: Yes.
>
> Defense Counsel: And you don't feel you could be fair.
>
> Juror: I'm just saying I'm just uncomfortable knowing that just now, like you were saying, how you just all addressed our – where we live and everything, our address and all that. Yes, I do feel uncomfortable.
>
> Defense Counsel: And I don't know that you raised your hand, but I'm sensing Miss McCann, that you wanted to weigh in on this issue as well.
>
> Juror: I'm in complete agreement. We've completely exposed ourselves pretty – I mean it's not too hard to find out any information about any of us who serve on this jury and have some – and have some concerns about that.

(127:44:23-25, 127:45, 127:46:1-13)

Testimony of M.C.M.

The State began its questioning of M.C.M. by highlighting whether she was afraid to testify.

> State: [M.C.M.], are you nervous about being here today?

M.C.M.: Yes, I am.

Defense Counsel: I'm going to object, Your Honor.

Court: Ask another question, Attorney Kolberg, please.

State: Do you need some tissues, [M.C.M]?

M.C.M.: No.

State: You okay?

M.C.M.: I'm okay.

(129:4:17-25, 129:5:1) (emphasis added).

Testimony of H.V.

During the testimony of H.V., he was asked how he knew Mr. Mendoza and responded that he had known Mr. Mendoza his whole life, essentially all of his forty years, as they grew up in the same neighborhood together. (129:30-31). The State did not accept this answer, and followed up by asking if he also knew Mr. Mendoza from their time together in any sort of group. (129:30-31). The exchange went as follows:

State: What happened after you left the bar?

H.V.: I really don't want to go there with that. You know what I mean? I'm not trying to put myself in any more danger than needs to be that I'm already.

Defense Counsel.: Objection.

The Court: Sustained. Sustained.

State: Is there a reason you don't want to answer my question?

H.V.: Of course.

Defense Counsel: Objection.

State: Can we approach, Judge?

The Court: Yes.

(Discussion off the record.)

(129:29:21-25, 129:30:1-8) (emphasis added).

State: Do you know Pedro Mendoza?

H.V.: Yes, I know him.

State: How long have you known him?

H.V.: For a long time.

State: When you say a long time, how long are we talking?

H.V.: 40 years probably.

State: How old are you?

H.V.: 40 years old. I've known him almost all my life.

State: Did you guys grow up in the same neighborhood?

H.V.: Yep.

State: And do you know him from when you were in your early 20's as well?

H.V.: Yes.

State: And how – What did you participate in any activities together?

H.V.: We grow up in the same neighborhood.

State: Are you both members of the Latin Kings street gang?

Defense Counsel: Objection.

The Court: Sustained.

State: Can we approach, Judge?

(Discussion off the record.)

(129:30:10-25, 129:31:14).

State: [H.V.], you're not here by choice today, are you?

H.V.: Nope.

(129:33:22-24).

Testimony of Officer Miller

Officer Keith Miller testified that he interviewed H.V. on the night of the shooting. (129:42). He explained to the jury that generally, it was not unusual for a person to be hesitant to provide information. (129:42). He testified as follows:

> State: Is there a particular reason why you…went into the back of the squad car?
>
> Det. Miller: Yes, usually we put the victims back in the squad car to keep them calm because we don't like to talk in front of other people. There's other people outside if I remember correctly.
>
> State: Is it usual for people to be hesitant to provide information?
>
> Det. Miller: Yes, it is.

(129:42:16-22).

Officer Miller continued and noted that H.V. agreed to speak with him, but declined to identify the shooter. The State asked Officer Miller why H.V. did not want to identify Mr. Mendoza. (129:44-45). Defense counsel objected and the court sustained the objection on hearsay grounds. (129:44-45).

The State incorrectly asserted that this testimony was relevant because it was a prior inconsistent statement of H.V. and the testimony was allowed. Notably, H.V. was never asked during his testimony to identify the shooter, nor was he asked whether he told Officer Miller that he knew the shooter, or why he did not wish to disclose the shooter's identity to police. (129:44-45). This exchange went as follows:

> State: He said he recognized this person?
>
> Det. Miller: That is correct.

> State: Was he willing to tell you who that person was?
>
> Miller: No, he was not.
>
> State: Did he tell you why he didn't want to tell you who the person was?
>
> Defense Counsel: Objection, hearsay.
>
> Court: Sustained. Go ahead.
>
> State: Judge, if we may approach on that, it's a prior inconsistent statement.
>
> (Side bar discussion off the record) [2]
>
> State: Did [H.V.] tell you that he was afraid to tell you who it was that had shot at him?
>
> Miller: Yes, he did.

(129:44:12-25, 129:45:1).

Testimony of Detective Jason Enk

During the testimony of Detective Enk, the State played approximately twelve minutes of the first portion of Mr. Mendoza's interview. The clip started following the pedigree portion of the

[2] While there was no official statement of the court that it had changed its ruling on trial counsel's objection, that the State followed up with a nearly identical question without objection implies that the court reversed its ruling during the sidebar with the parties, permitting this line of inquiry by the State. (129:44-45).

interview.[3] In the clip played for the jury, Mr. Mendoza's gang affiliation is not discussed between he and Detective Enk until the very end of the interview, beginning at about 20:25 minutes into the video on the counter. (116:Trial Exhibit 30).

It was Detective Enk who began asking questions about Mr. Mendoza's history with the Latin Kings. In the interview, the detective questioned Mr. Mendoza regarding his and H.V.'s prior gang affiliation, repeatedly using the terms "bang" and "banger." This portion of the interview was played for about two minutes with no attempt by the State to stop the video and no objection from defense counsel. (129).

After the video was played, the State emphasized the gang affiliation and inquired about the meaning of the term "bang." The defense did not object to the playing of the last three minutes of the video or the questioning regarding the terminology used to describe gang membership. (129).

> State: And I'm going to pause at 23 minutes. And is that the conclusion of the first interview that you were talking about with the Defendant, Mr. Mendoza?
>
> Det. Enk: Yes, it was.

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[3] During the pedigree portion of the interview, Mr. Mendoza was asked by Detective Enk if he was ever in a gang. Mr. Mendoza responded that he was involved in the Latin Kings, but that he had not been in the gang for approximately twenty-five years. (116:Trial Exhibit 30, 9:15).

> State: There are a couple of things I was hoping you could clarify for us. At the end there, you're using the term bang?
>
> Det. Enk: Yes.
>
> State: Can you describe what that term means?
>
> Enk: Bang is a street term reference, being a member of a criminal street gang.

(129:80:1-11).

Jury Instructions

When providing instructions to the jury, the court read a specially crafted jury instruction intended to explain to the jurors that the evidence of the gang affiliation had been admitted only to establish that the two men knew one another. The actual instruction was as follows:

> The Court: During the trial, certain evidence was introduced that during the 1990's (sic), some members of a street gang known as the Latin Kings, were prosecuted for criminal activities[4]. Further, both [H.V.] and Mr. Mendoza acknowledged having a past affiliation with that gang. This evidence was admitted to establish that [H.V] and Mr. Mendoza were familiar with one another, prior to the events of May 4 of 2014. You may consider this evidence and give it the

[4] It should be noted that no evidence regarding the criminal prosecution of [H.V.] was brought before the jury, and Mr. Mendoza was never prosecuted for activities related to the gang.

> weight if any, you feel it deserves. However, you must not infer that gang affiliation has any bearing on the issues of this case, unless you determine that such inferences, are supported by additional independent evidence admitted during this trial.

(131:16:21-25, 131:17:1-8).

There was no objection by the defense to this instruction.

Closing Statements by the Prosecutor

During closing arguments, the State made asserted numerous times that both H.V. and M.C.M. were fearful of Mr. Mendoza. The State argued:

> …when you saw [H.V.] on that stand, you could feel in the room, that is somehow the fear. He was not going to answer those questions. And there was only one reason that he was not going to answer those questions. And that was because the man who is sitting at the defense table was the person who shot at him on May 4 of 2014.

(131:23:4-11).

> The defense wants to fault [M.C.M.] for that time lapse [in coming to the police to cooperate], there's a reason, she's concocting a plan, some sort of things. Coming forward to the police was probably – other than testifying yesterday was probably the scariest thing she's ever done. She cannot be faulted for taking some time to think about consequences for herself, her fiancée, and her family.

> She cannot be faulted for weighing that decision carefully, and it weighed heavily on her and she ultimately, did come forward.

(131:27:16-25, 131:28:1-6).

> We have heard a lot about their history together. It's been a long history. They know each other a long time. Something very suspicious has been going on because Mendoza says they've seen each other the last couple years, and everything was fine. But then he walks into a bar and just gets a bad vibe. That – That doesn't make a whole lot of sense. It simply doesn't.
>
> They have a long, colorful history. Something is going on there, and it also doesn't make sense, if they're on really good terms, why would [H.V.] just start shooting out of a car at him? Something is going on here.
>
> While it's unfortunate that I can't tell you why, the judge said we don't have to prove why. And I wish we could, but what we what happened from physical evidence and what we know happened based on this evidence

(131:33:17-25, 34:1-6).

The State also challenged the defense position that M.C.M. was being untruthful in her account of what happened during the shooting – that H.V. did not have a gun and did not fire at Mr. Mendoza first. The State argued:

> And what motivation does she have to lie about it either? She's never met Mr. Mendoza before. She doesn't know him.
>
> We know that's true because Mr. Mendoza testified he doesn't know her, never seen her before. So she's telling the truth. Why would she come forward and say it? It simply doesn't make any sense.

(131:28:6-12).

Sentencing

The jury returned a verdict of guilty on both counts. The court sentenced Mr. Mendoza to eight years initial confinement and two years extended supervision on Count one, and a concurrent term of five years initial confinement and two years extended supervision on Count two. (108; 132).

Postconviction Proceedings

Mr. Mendoza, by undersigned counsel, filed a Rule 809.30 postconviction motion and supplement that alleged the following claims (101):

1. Trial counsel was ineffective for failing to continually and properly object to the admission of impermissible other acts evidence.

2. Trial counsel was ineffective for failing to present relevant character and other acts

evidence[5] related to H.V. and M.C.M. to challenge the State's assertions that H.V. did not possess a gun during the shooting and the repeated implication that the couple feared Mr. Mendoza and retaliation from him if they cooperated with his prosecution.

3. Trial counsel was ineffective for failing to introduce evidence of Mr. Mendoza's diagnosis of combat-related PTSD and expert testimony regarding the disorder in support of his claim of self-defense.

4. Trial counsel was ineffective for failing to fully present evidence related to Mr. Mendoza's PTSD diagnosis as a mitigating factor at sentencing.

5. Mr. Mendoza also requested sentence modification on the grounds that the court was unaware of the extent and relevance of

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[5] Both H.V. and M.C.M. were previously charged with several crimes related to their efforts to intimidate witnesses, to conspire to solicit false testimony, and to influence the outcome of criminal proceedings in Milwaukee County. See Milwaukee County Case Numbers 1994CF940466, 1994CF940818 & 2009CF4127 (101:21-26, 30-35). Additionally, both H.V. and M.C.M. were unable to legally possess a firearm at the time of the incident as both were felons, and H.V. was also subject to an injunction with a firearm prohibition. See *U.S. v. Herminio Vega*, No. 97-CR-00133; *U.S. v. Acosta*, No. 98-CR-00104; Milwaukee County Case Number 2009CF4127 & 2014FA904. (101:21-35).

his combat history and PTSD diagnosis at the time of sentencing.

The matter was set for briefing, and the court ordered that an evidentiary *Machner*[6] hearing be held on the motion. (133).

At the hearing, trial counsel testified that this was a case he remembered well and would never forget. (133:5). He asserted that the defense strategy was always to argue that Mr. Mendoza shot at H.V., but that he shot in self-defense, as H.V. and pulled a gun on him and fired at him first. (133:5-6). Counsel testified that developing the trial strategy was particularly difficult in this case because there were "pretrial motions that weren't decided" by the court ahead of the trial, specifically those related to the admissibility of the supposed gang affiliation of H.V. and Mr. Mendoza. (133:6).

Trial counsel testified that he adamantly opposed the introduction of the supposed gang ties between the two men, filing written pleadings opposing the State's request and objecting ahead of trial. (133:7). Trial counsel noted that he had requested a formal ruling on admissibility on several occasions prior to trial. (133:7). Trial counsel acknowledged that the State brought up the alleged gang connection as early as voir dire, and admitted that he had erred in not contemporaneously objecting at that time. (133:7-8). He acknowledged that the

[6] *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (1979).

lack of objection was not due to a change in trial strategy. (133:7-9).

Regarding character and other acts evidence of H.V. and M.C.M., trial counsel testified that he checked CCAP and also found some news articles about M.C.M.'s prior criminal activity, but he did not feel this would be admissible at trial. (133:11). Trial counsel admitted, however, that he had not actually reviewed the complaints and allegations underlying the prior convictions before he decided to not seek admission of the other acts as character evidence. (133:11-12).

Trial counsel also testified that while he was aware of Mr. Mendoza's PTSD diagnosis and had attempted to investigate the matter further, he did not secure a psychologist to provide guidance on how the diagnosis and Mr. Mendoza's combat experience could have been relevant to his self-defense claim or provide mitigating information at sentencing. (133:17-18). As a result, he abandoned that aspect of the defense prior to trial and sentencing. (133:17-18). On May 8, 2018, the circuit court heard argument and issued an oral ruling on the motion. The court denied the request for a new trial, but granted resentencing[7] based on his claim that trial counsel was deficient in his presentation of mitigating

[7] Mr. Mendoza was resentenced on July 20, 2018, to a term of three years and two months initial confinement and five years extended supervision. (136).

information regarding Mr. Mendoza's mental health and military service at sentencing. (135:27-28).

In denying Mr. Mendoza's request for a new trial, the court first concluded that the repeated references to the alleged gang affiliation and its implications was harmless, concluding that counsel was "overdramatizing the impact of this information." (135:25). The circuit court opined that the "Latin King" information was introduced by the State for the purpose of explaining why the victims were "reluctant" to testify. (135:23).

The court noted that it "never thought it was that big of a deal because [H.V. and Mr. Mendoza] were two middle-aged men" and that because "people who are or were Latin Kings have a lot of tattoos…," the gang affiliation was always going to be within the jury's purview "regardless of whether the parties touched on it or not." (135:24). The court agreed that it was skeptical that this incident was in any way gang-related, noting that "it did seem to be quite a stretch." (135:24). The court stated:

> I think what the state wanted to do was to present context for these people on the jury of why these people who had been shot were reluctant. But I never felt that it was very compelling, you know, character-type, Whitty-type evidence, given that this alleged relationship was, I don't know, think in the early '90s or before that.
>
> …these were two middle-aged men. They did not particularly look like young men who would be in

> a gang. I think your guy sort of wore a bowler hat through most of the trial which, you know, was an interesting look. But I think you're overdramatizing the impact of this information, Miss Masnica, if I'm being quite honest with you.

(135:24-25).

Regarding the admissibility of other acts and character evidence relating to H.V. and M.C.M., the court concluded that this evidence would never be admissible in a criminal case and did nothing but "show[] that [Mr. Mendoza] grew up with people that have problems." (135:25). The court concluded the evidence was irrelevant to Mr. Mendoza's offense and would have "only generated sympathy for these people who got shot at." (135:26).

Finally, regarding the alleged error in not presenting evidence detailing Mr. Mendoza's combat history and PTSD diagnosis, the court noted that even though trial counsel did not say that it was a strategic decision not to present this evidence, to the court, "it was a strategic decision not to go down that route." (135:26).

Accordingly, the trial court denied Mr. Mendoza's request for a new trial. (135).

Mr. Mendoza now appeals.

ARGUMENT

I. Mr. Mendoza's Sixth Amendment rights were violated when trial counsel failed to contemporaneously object to the admission of impermissible other acts gang evidence.

A. Legal principles and standard of review.

1. Ineffective Assistance of Counsel

An accused's right to the effective assistance of counsel derives from the Sixth and Fourteenth Amendments to the United States Constitution, and Art. I, sec. 7 of the Wisconsin Constitution. *State v. Smith*, 207 Wis. 2d 258, 273, 558 N.W.2d 379 (1997). In assessing whether counsel's performance satisfied this constitutional standard, Wisconsin applies the two-part test outlined in *Strickland v. Washington*, 466 U.S. 668 (1984); *Smith*, 207 Wis. 2d at 273.

To establish a deprivation of effective representation, a defendant must demonstrate that: (1) counsel's performance was deficient, and (2) counsel's errors or omissions prejudiced the defendant. *Id.* To prove deficient performance, the defendant must establish that his or her counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* (citations omitted).

The prejudice prong requires a showing that "there is a reasonable probability that, but for

counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Smith*, 207 Wis. 2d at 276 (citing *Strickland*, 466 U.S. at 694).

Questions of ineffective assistance of counsel present a mixed question of law and fact. *State v. Thiel*, 2003 WI 111, ¶21, 264 Wis. 2d 571, 665 N.W.2d 305, citing *State v. Trawitzki*, 2001 WI 77, ¶19, 244 Wis. 2d 523, 628 N.W.2d 801. The reviewing court will defer to the circuit court's findings of fact unless clearly erroneous. *Id.* Whether trial counsel's performance was deficient as a matter of law is a question the court reviews de novo. *Id.*

2. The admissibility of other acts evidence.

Generally, evidence of other crimes, wrongs, or acts is not admissible during trial to "prove the character of a person in order to show that the person acted in conformity therewith." Wis. Stat. §904.04(2). In *Whitty v. State*, the Supreme Court explained why evidence of other acts should be limited:

> (1) The overwhelming tendency to presume the defendant is guilty because he is a person likely to commit such acts;
>
> (2) the tendency to condemn not because of the defendant's actual guilt, but because he may have escaped punishment for previous acts;

> (3) the injustice in attacking a person who is not prepared to show that the evidence used for attack is fabricated; and
>
> (4) the confusion of issues that may result in the introduction of other crimes.

34 Wis. 2d 278, 292, 149 N.W.2d 557 (1967). However, other acts evidence may be allowed when the evidence is "offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Wis. Stat. § 904.04(2).

In *State v. Sullivan*, the supreme court set forth a three-pronged analysis for admission of other acts evidence. 216 Wis. 2d 768, 576 N.W.2d 30 (1998). The test asks:

> (1) Is the "other acts" evidence offered for an acceptable purpose under Wis. Stat. §904.04(2), such as establishing motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident;
>
> (2) Is the "other acts" evidence relevant under Wis. Stat. §904.01;
>
> (3) Is the probative value of the "other acts" 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?

Id. at 772-73.

When considering whether the trial court erroneously exercised its discretion in denying admission of pro-offered evidence, a reviewing court must determine whether the trial court applied the correct law to the pertinent facts and reached a reasonable conclusion. *See State v. Smith*, 2002 WI App 118, ¶¶7-8, 254 Wis. 2d 654, 648 N.W.2d 15.

B. Reference to and admission of testimony regarding Mr. Mendoza's prior affiliation with the Latin Kings was irrelevant and highly prejudicial, and trial counsel's failure to object to its presentation during voir dire deprived Mr. Mendoza his constitutional right to effective assistance of counsel.

As summarized in the fact section above, the statements and testimony surrounding Mr. Mendoza's prior gang affiliation do not satisfy the *Sullivan* test because (1) the evidence was not admitted for a permissible purpose, (2) the evidence was irrelevant to whether Mr. Mendoza acted in self-defense, and (3) evidence was unfairly prejudicial. Therefore, testimony regarding Mr. Mendoza's prior gang affiliation should have been excluded as improper "other acts" evidence.

First, the evidence was not admitted for a permissible purpose under the *Sullivan* analysis. That Mr. Mendoza and H.V. had both been members of the Latin Kings more than twenty years prior to the incident does not establish proof of motive,

opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident as required by Wis. Stat. §904.04(2)(a).

Instead, admission of the gang affiliation evidence provided the jury with ample reason to speculate that Mr. Mendoza was a "bad guy," dangerous, and more likely to have shot H.V. unprovoked due to something related to the gang because of his past association with the Latin Kings. This is exactly what Wis. Stat. §904.04(2)(a) was intended to prevent: an invitation to focus on an accused's character rather than the facts underlying the charge. *Sullivan*, 216 Wis. 2d at 783. Painting their relationship as one stemming from membership in the Latin Kings simply magnified the risk that jurors would punish Mr. Mendoza for other bad character or actions, regardless of his guilt for the charged crime. *Id.*

Second, the evidence was not relevant to the issue before the jury. The jury was there to consider whether Mr. Mendoza reasonably acted in self-defense. While the State argued pretrial that the presentation of the alleged gang connection was necessary to explain how H.V. and Mr. Mendoza knew one another, this information was not necessary to answer that question. Both H.V. and Mr. Mendoza (and Mendoza during his interrogation) testified at trial that they knew one another for over forty years, since they were children, growing up in the same neighborhood together. (129:30:10-25, 129:31:14). Neither reported that they had met when

they were young men in the Latin Kings. Moreover, identity was never an issue in this case as Mr. Mendoza had voluntarily turned himself into police hours after the incident, bringing with him the gun used in the shooting and his CCW permit. (1).

Further, admission of this evidence complicated the matter unnecessarily and implied to the jury that there was some underlying motive that Mr. Mendoza went after H.V., and therefore, less likely that he was reasonable exercising his privilege of self-defense. The voir dire transcript plainly outlines the effect this information had on the jury. While not all of the jurors specifically spoke about the issue during voir dire, the reactions of those who did shows just how inflammatory this type of evidence truly was. (128:35-38, 44-46).

Third, while Mr. Mendoza contends that the gang testimony had no probative value, if this court disagrees, any marginal value it may have is substantially outweighed by the danger of unfair prejudice caused by admission of this inflammatory evidence. Any prior affiliation with the Latin Kings street gang in no way advanced the State's case, or proved or disproved that Mr. Mendoza acted in self-defense when he fired toward H.V.'s vehicle. Such improper influence on a jury's decision-making process is the legal prejudice that the balancing test of Wis. Stat. §904.03 seeks to address.

While the State pre-trial and the circuit court in its oral ruling attempted to minimize the damage

this information would do to Mr. Mendoza's case, the words of the jurors during voir dire showed just how prejudicial this information was. Members of the prospective jury panel expressed their fear that they could be in danger if chosen to decide the case. A juror noted that the jury panel had been required to state their names, their family members' names and where they live in open court, and that this could be dangerous for them. (127:35:13-19; 127:36:1-11). In addition, several jurors said they did not feel comfortable being a part of the panel after learning about the alleged gang ties between Mr. Mendoza and H.V., with one even pointing out that it made no difference how long he had been out of the gang – Mr. Mendoza could still pose a threat. (127:44:23-25, 127:45, 127:46:1-13).

For these reasons, trial counsel was deficient[8] for failing to object to the State's line of questioning during voir dire and to any other testimony or reference to Mr. Mendoza's dated membership with the Latin Kings. That the court later sustained some of trial counsel's objections to halt a few of the State's attempts to discuss the gang evidence is because the nature of the inadmissible evidence was so inflammatory, a curative instruction at the conclusion of trial could not cure the error. Moreover, the special instruction developed by the court did more harm than good, as it stated that evidence had

[8] Trial counsel testified that his failure to object at that point was in no way a strategic decision to abandon his objection to the admission of the gang membership. (133:7-8).

been presented regarding the criminal prosecution of members of the Latin Kings, a gang Mr. Mendoza and H.V. had been a part of.[9] This only added another layer of inadmissible (and highly misleading – Mr. Mendoza was never prosecuted for any crime related to his gang membership as a young man) other acts evidence and did nothing to mitigate the prejudice that resulted as a result of the discussion of the gang evidence.

This error was not harmless. Evidence of Mr. Mendoza and H.V.'s affiliation with the Latin Kings touched every part of this trial, from voir dire to closing statements, and as a result Mr. Mendoza was

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[9] The Court's special curative instruction was read to the jury as follows:

> During the trial, certain evidence was introduced that during the 1990's (sic), some members of a street gang known as the Latin Kings, were prosecuted for criminal activities. Further, both [H.V.] and Mr. Mendoza acknowledged having a past affiliation with that gang. This evidence was admitted to establish that [H.V] and Mr. Mendoza were familiar with one another, prior to the events of May 4 of 2014. You may consider this evidence and give it the weight if any, you feel it deserves. However, you must not infer that gang affiliation has any bearing on the issues of this case, unless you determine that such inferences, are supported by additional independent evidence admitted during this trial.

(131:16:21-25, 131:17:1-8).

unfairly prejudiced. *See State v. Long*, 2002 WI App 114, 255 Wis. 2d 729, 647 N.W.2d 884 (testimony regarding defendant's gang affiliation did not permeate "the trial as to create a risk of unfair prejudice or confusion," as the State "did not belabor the point of [the defendant's or] any witnesses' gang association…" and their "gang activities did not play a prominent role in either the State's opening or closing arguments); Wis. Stat. § 904.02. Accordingly, Mr. Mendoza requests that this court reverse the order of the circuit court and remand for a new jury trial.

II. Trial counsel was ineffective for failing to present other acts evidence establishing that H.V. and M.C.M. had the motive, intent and opportunity to falsely deny that H.V. had possessed a gun, had instigated the violence by shooting at Mr. Mendoza first and had fled the scene to dispose of the weapon.

A. Legal principles and standard of review.

Evidence is relevant for the purposes of admission at trial when it has "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.

Under Wis. Stat. §904.04(1), character evidence is generally "not admissible for the purpose of proving that the person acted in conformity therewith

on a particular occasion." There are, however, established statutory exceptions to this rule. One of these exceptions allows for the admission of character evidence pertaining to a victim. Wis. Stat. §904.04(1)(b) allows "evidence of a pertinent trait of character of the victim of the crime" when offered by the accused. Character of an individual can be established through "testimony as to reputation or by testimony in the form of an opinion," or through cross-examination of the witness to whom the other acts relate. Wis. Stat. §904.04 and §906.08(2).

Wis. Stat. §904.04(2)(a) provides the structure under which evidence of other crimes, wrongs or acts may be admitted into evidence (see previous section for a detailed overview). While the court cannot permit the use of other acts as propensity evidence, other acts evidence is admissible "when offered for other purposes, such as a proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Wis. Stat. §904.04(2)(a).

This claim was raised in the postconvinction motion as one of ineffective assistance of counsel due to counsel's failure to present this evidence. Questions of ineffective assistant of counsel present a mixed question of law and fact. *Thiel*, 2003 WI 111, ¶21, citing *Trawitzki*, 2001 WI 77, ¶19. The reviewing court will defer to the circuit court's findings of fact unless clearly erroneous. *Id.* Whether trial counsel's performance was deficient as a matter of law is a question the court reviews de novo. *Id.*

B. Trial counsel was ineffective in failing to present admissible other acts and evidence pertaining to H.V. and M.C.M.'s motive to lie about their fear of Mr. Mendoza and motive to deny that H.V. had a gun and shot first at Mr. Mendoza.

H.V.'s prior efforts to influence witness testimony, as well as M.C.M.'s prior conspiring with a co-defendant to falsify evidence at trial were highly relevant to the central issues in the trial of whether H.V. and M.C.M. were innocent victims of a random shooting or whether Mr. Mendoza fired to protect himself only after H.V. had pulled out a gun and shot at him first, and whether they feared Mr. Mendoza. Defense counsel should have presented this other acts evidence to the jury in support of Mr. Mendoza's self-defense claim.

H.V. and M.C.M.'s prior bad acts were relevant in order to rebut the State's repeated assertions at trial that H.V. and M.C.M. were reluctant to testify against Mr. Mendoza out of fear for their safety. From the start of the case, the State implied that Mr. Mendoza was a dangerous man and that H.V. and M.C.M. were afraid of him. The State informed the jury that "we're going to hear in this case that the victim, the victim and the Defendant, have an affiliation with the Latin Kings street gang and that there are witnesses who are going to be afraid to be here." (127:35). The State again addressed the impact of the alleged gang affiliation later on in voir dire. The State asserted that "[w]e're going to hear from

the witnesses who don't want to be here. They concerned about their safety and what's going to happen." (127:38). The State implied that due to Mr. Mendoza's gang affiliation, witnesses were afraid to testify against him. The State did not assert this claim as a matter of opinion, but rather as a matter of fact.

At the outset of M.C.M.'s trial testimony, the State drew attention to her behavior on the stand, as she was crying and perceived reluctance to testify. The first question the State asked of M.C.M. was: "…are you nervous about being here today?" (129:4). Then the State offered her a tissue.

During H.V.'s testimony, he asserted that he did not wish to testify because he did not want to put himself in any more danger than he already is in just for being there. (129:29). The court sustained trial counsel's objection to that prejudicial answer, but the State continued, asking H.V. if there was a reason he did not want to answer that question, to which he opined, "Of course." (129:29-30). The State went on to point out that H.V. was not testifying "by choice."

In addition, during its questioning Officer Miller, the State again emphasized H.V.'s reluctance to turn over Mr. Mendoza's name as the other shooter, asking Officer Miller if the reason that H.V. did not provide a name was because he was afraid of that individual. (129:44-45). The officer confirmed that this was what H.V. said.

And finally, during closing, the State made several references to H.V. and M.C.M.'s reluctance to report the shooting and to initially cooperate in the investigation, as neither party was willing to identify the shooter until more than a month after the incident. The State argued to the jury that the only reason H.V. did not want to answer questions at the trial was because he feared Mr. Mendoza. The State asserted:

> …when you saw [H.V.] on that stand, you could feel in the room, that is somehow the fear. He was not going to answer those questions. And there was only one reason that he was not going to answer those questions. And that was because the man who is sitting at the defense table was the person who shot at him on May 4 of 2014.

(131:23:4-11).

The State also defended H.V. and M.C.M.'s refusal to cooperate in the investigation. The State specifically argued that M.C.M and H.V. were not scheming to help their own potentially compromised legal position:

> The defense wants to fault [M.C.M.] for that time lapse [in coming to the police to cooperate], there's a reason, she's concocting a plan, some sort of things. Coming forward to the police was probably – other than testifying yesterday was probably the scariest thing she's ever done. She cannot be faulted for taking some time to think about consequences for herself, her fiancée, and her family.

> She cannot be faulted for weighing that decision carefully, and it weighed heavily on her and she ultimately, did come forward.

(131:27:16-25, 131:28:1-6).

Mr. Mendoza's entire defense at trial was that he acted in self-defense, and that H.V. had pulled a gun on Mr. Mendoza and fired first. Defense counsel argued at trial that H.V. and M.C.M had motive and opportunity to leave the scene to protect themselves from prosecution for instigating the shooting, and that they only returned to the scene after being spotted and followed by a police squad heading to the scene to investigate. (131:35-36, 38-39). The delayed report, counsel asserted, was because Mr. Mendoza had already come forward and informed police that he was involved in the shooting, but that he was only acting in self-defense. (131:41-43). However, without introduction of the relevant other acts evidence for H.V. and M.C.M., the defense appeared to be nothing more than a convenient theory. In reality, H.V. and M.C.M. had significant motive and the intent, opportunity and plan necessary to falsify their testimony, assert that they were never armed and to claim Mr. Mendoza shot at them unprovoked.

Evidence regarding H.V. and M.C.M.'s past efforts to present false testimony and to sway the outcome of criminal cases are highly relevant to a material issue before the jury and are admissible for a permissible purpose in Wis. Stat. §904.04(2)(a) – i.e., motive and intent to lie. *See State v. Missouri*, 2006 WI App 74, 291 Wis. 2d 466, 714 N.W.2d 595.

Specifically, both H.V. and M.C.M. had previously been charged with conspiring to get witnesses to lie at trial and to falsify testimony to suit their needs. H.V. had been arrested and charged on multiple occasions of intimidating witnesses and victims involved in accusations against members of the Latin Kings. (85:21-26). H.V. threatened death and bodily harm to innocent people in an attempt to encourage those witnesses to lie to the court or to not show up at trial in violation of court-ordered subpoenas. (85:21-26). Defense counsel should have pursued, under Wis. Stat. §§904.04(1)(b) and (2)(a), admission of H.V.'s prior attempts at improperly swaying witness testimony in criminal proceedings to establish his motive and intent to conspire with M.C.M. to falsely claim that he was not armed and that Mr. Mendoza shot at them unprovoked.

Similarly, available other acts evidence existed which defense counsel could have also sought to admit against M.C.M. to establish her motive and intent to conspire with H.V. to falsely claim that he was not armed and that Mr. Mendoza shot at them unprovoked. Specifically, in Milwaukee County Case Number 2009CF4127, M.C.M. was charged and later convicted of felony bail jumping for violating a no-contact order by conspiring with her boyfriend to lie at trial and to recruit witnesses to testify falsely. (85:30-35).

At the time, M.C.M.'s boyfriend, Louis Domenech, was in custody for Milwaukee County Case Number 2009CF1863, which alleged that he

shot and attempted to kill a police officer with a gun purchased by M.C.M. (85:32). While on bail, M.C.M. and Domenech were recorded on the telephone discussing the need for M.C.M.'s trial testimony to align with Domenech's, who stated, "if they stick together they can win the case." (85:33). The couple was recorded discussing the need for more witnesses who would testify in favor of Domenech and contrary to the police witnesses in the case. (85:33-34). During that call, M.C.M. told her boyfriend that she knew of some people on 36th Street who could be witnesses. M.C.M. also stated during the call that "[the police] better not fuck with" Domenech or she will "hurt all of them." (85:34).

On another date, M.C.M. falsely presented herself at the Milwaukee County Jail in an attempt to visit with Domenech in person and in violation of the no-contact order. (85:34). She concocted a scheme to request to visit another inmate, and once in the visiting room, Domenech and the other inmate would switch seats. (85:34).

Defense counsel should have pursued, under Wis. Stat. §§904.04(1)(b) and (2)(a), admission of M.C.M.'s prior conspiring with her boyfriend to present falsified testimony in criminal proceedings in order to establish her motive and intent to conspire with H.V. to falsely claim that he was not armed and that Mr. Mendoza shot at them unprovoked.

Similarly, H.V. and M.C.M.'s status as felons, and the recent grant of an injunction against H.V.,

are facts directly relevant to Mr. Mendoza's defense and would be admissible for a permissible purpose under Wis. Stat. §904.04(2)(a). This is because their felony offender status and the injunction against H.V. prevented them from legally possessing firearms under Wis. Stat. §941.29(1m). Possession of a gun during this incident by either H.V. or M.C.M. for whatever reason, would have subjected both to new felony charges carrying substantial prison exposure. Wis. Stat. §941.29(1m). Coupled with the fact that the couple left the scene immediately after the shooting and returned several minutes later, H.V. and M.C.M. had motive and opportunity to dispose of a gun used in this shooting and these other acts put their behavior into context and directly challenge the State's assertion that they had no motivation to lie about the incident. Trial counsel should have cross-examined H.V. and M.C.M. about their felony status and understanding of what penalties they faced if arrested with a firearm.

These other acts are relevant to the motive, intent and plan of H.V. and M.C.M. to falsify testimony against Mr. Mendoza in this case. Notably, it was only after Mr. Mendoza turned himself in and reported to police that he fired at H.V. in self-defense that M.C.M. came forward with a different story of what happened that night. Defense counsel asserted that H.V. and M.C.M. concocted a plan to frame Mr. Mendoza as the initial shooter. The State specifically rebutted this argument throughout the case, implying that H.V. and M.C.M.'s lack of cooperation had nothing to do with their intent to protect their

own legal interests, but because Mr. Mendoza was so frightening, they did not wish to testify against him.

Contrary to the circuit court's conclusion on the postconviction motion, this evidence would not be inadmissible due to its perceived prejudicial nature. While other acts evidence of this nature related to a criminal defendant must be excluded if its relevance is outweighed by the risk of unfair prejudice to a criminal defendant, when considering whether this type of evidence prejudices the State, the calculus is more nuanced, as the State has different rights and very different goals as a criminal defendant.

The final question in the *Sullivan* test is whether the probative value of the other acts evidence is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury? *Sullivan*, 216 Wis. 2d at 772-73. That is not the case here. Further, the probative value of evidence that directly challenges the testimony and credibility of the key witnesses against a defendant cannot be overstated.

The other acts here directly support Mr. Mendoza's claim that M.C.M. and H.V. were untruthful in their reports of what happened the night of the shooting, and had the motive, intent and opportunity to lie and conceal. Throughout the trial and into the closing, the State repeatedly implied there must be some sort of illicit reason as to why Mr. Mendoza wanted to hurt H.V. The State even hinted

that it knew there was more to the story, but that it could not share what with the jury. (131:34).

The State directly asked the jury at closing – what motivation did M.C.M. have to lie about why they fled the scene rather than wait on police? What motivation did the defense point to in order to establish M.C.M.'s motive to lie and claim that Mr. Mendoza was the instigator of the incident? The other acts evidence outlined here would have provided the jury with an explanation of how and why H.V. and M.C.M. conspired get rid of their gun and to falsify their testimony to put all the blame on Mr. Mendoza for the shooting.

Presentation of this evidence would do little to prejudice the State, who would have the opportunity to rehabilitate its witnesses after cross-examination on these topics. The State is not prejudiced simply because other acts evidence may make proving a case more difficult. In *State v. Missouri*, this court explained why, when considering the admissibility of other acts to challenge the credibility of a witness against the defendant, trial courts must be careful not to automatically exclude such evidence as overly prejudicial. This court wrote:

> The State, like this court, operates with the priority of searching for truth and justice. Our system depends upon all witnesses being forthright and truthful and taking seriously the oath to tell the truth when testifying in a legal proceeding. Evidence that challenges the credibility of a State's witness promotes that goal

> and cannot be summarily dismissed as overly prejudicial. When the jury hears all of the witnesses who can provide relevant information on the issues, it can make a fair assessment as to who is being truth.

Missouri, 2006 WI App 74, ¶17.

Therefore, H.V. and M.C.M.'s prior attempts to falsify testimony and their character for untruthfulness was admissible under the *Sullivan* analysis, as was their status as felons and the valid injunction prohibiting H.V. from possessing a firearm. As a result, trial counsel was ineffective for failing to properly investigate H.V. and M.C.M. and to cross-examine the witnesses on this information. Notably, trial counsel testified that failure to present this evidence was not strategic, but rather his investigation was lacking and did not fully uncover the relevance of this evidence. (133:11-12).

Trial counsel's errors were highly prejudicial as had this evidence come in, the jury would have had a very different lens through which to view H.V. and M.C.M.'s behavior and testimony at trial. Because "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," prejudice has ensued and this court must reverse the decision of the trial court and remand this matter for a new trial. *Smith*, 207 Wis. 2d at 276 (citing *Strickland*, 466 U.S. at 694).

III. Trial counsel was ineffective for failing to introduce evidence of Mr. Mendoza's diagnosis of combat-related post-traumatic stress disorder and expert testimony regarding this type of disorder in support of his claim of self-defense.

A. Legal principles and standard of review.

Expert testimony is admissible at trial if it can assist a trier of fact to understand and interpret evidence or to determine a fact at issue before the jury. *State v. Richardson*, 189 Wis. 2d 418, 423, 525 N.W.2d 378 (Ct. App. 1994); Wis. Stat. §907.02. In cases regarding a claim of self-defense, a particular trait of the defendant may be of relevance to the jury. Wisconsin courts have held that comparison expert testimony is admissible in cases in which self-defense is at issue due to the subjective nature of the inquiry before the jury. Comparison testimony is that provided by an expert describing the behavior of those who suffer from the same condition as the defendant, describing the behavior of the defendant and finally offering "an opinion about whether the complainant's behavior is consistent with the behavior of other victims." *Richardson*, 189 Wis. 2d at 425-426.

In a self-defense case such as this, the jury is charged with the answering the question of whether the State proved beyond a reasonable doubt that the defendant did not act lawfully in self-defense. One may act intentionally in self-defense if:

> (1) the defendant believed that there was an actual or imminent unlawful interference with the defendant's person;
>
> (2) the defendant believed that the amount of force the defendant used or threatened to use was necessary to prevent or terminate the interference; and
>
> (3) the defendant's beliefs were reasonable.

(Wisconsin Criminal JI 801). Both the first and second considerations before the jury concern the subjective belief of the actor and his perception of his surroundings at the time of the shooting.

B. Trial counsel was ineffective for failing to retain an expert to present evidence explaining how Mr. Mendoza's diagnosis of combat-related post-traumatic stress disorder affected his behavior in this case.

Mr. Mendoza enrolled in the U.S. Army in 2003. (85:44). While in the service, he was deployed to Iraq for about a year and his primary duty was tank recovery. (85:44). During that tour, Mr. Mendoza experienced repeated combat trauma, being subjected to regular hostile fire, observing fellow soldiers being injured and killed, and handling wounded soldiers on multiple occasions. (85:45). In 2006, after returning from Iraq, Mr. Mendoza was diagnosed with PTSD. (85:44). He was treated with medication beginning in 2006 and his treatment has been continuous to this day. (85:37-42).

Throughout the course of his treatment, Mr. Mendoza has consistently described his PTSD symptoms. (85:37-42). He reported that he struggles to sleep, feels jumpy, overly alert, numb, angry, easily startled, detached and depressed. (85:37-42). These symptoms can account for his state during the shooting, as well as his "detached" attitude about the shooting after the fact as reported by the detectives and other witnesses at trial.

Dr. Michael Spierer, a psychologist retained on appeal to review Mr. Mendoza's case, discussed the PTSD diagnosis at length, providing a literature review drawing comparisons between Mr. Mendoza's symptoms and other veterans diagnosed with PTSD. (85:36-45). Dr. Spierer's report notes that as of September 2014, there were more than 2.7 million American veterans who had served in the Iraq and Afghanistan wars. (85:43). Of those veterans, studies following the incidences of PTSD in the returning population of veterans put the rate of suffering between 14 and 31 percent. Those returning from combat experience hyper-arousal. (85:43). Dr. Spierer reported that Mr. Mendoza was similarly "hyper aroused" at the time of the incident based on his review of the reports and testimony at trial. (85:43).

At trial, the State attempted to challenge Mr. Mendoza's credibility and use his statement that he had a bad feeling when entering the bar and immediately wanted to leave as evidence that something questionable was afoot. During closing, the State questioned Mr. Mendoza's statement that

the crowded bar gave him a "bad vibe," arguing that his testimony did not make sense and that he must have been hiding something. (131:33-34). The State argued:

> Something very suspicious has been going on because Mendoza says they've seen each other the last couple years, and everything was fine. But then he walks into a bar and just gets a bad vibe. That – That doesn't make a whole lot of sense. It simply doesn't.
>
> They have a long, colorful history. Something is going on there, and it also doesn't make sense, if they're on really good terms, why would [H.V.] just start shooting out of a car at him? Something is going on here.
>
> While it's unfortunate that I can't tell you why, the judge said we don't have to prove why. And I wish we could, but what we what happened from physical evidence and what we know happened based on this evidence

(131:33-34).

Coupled with the introduction of the gang evidence, this gave the jury permission to make unsupported assumptions about the relationship between H.V. and Mr. Mendoza. Dr. Spierer's report, however, provides a clear explanation for this behavior rooted in Mr. Mendoza's PTSD diagnosis. He wrote that "individuals with PTSD persistently avoid being in the presence of stimuli that might arouse memories or thoughts of experiences related to trauma." (85:43). For example, he pointed out that

some soldiers with PTSD avoid loud places and wish to stay away from other soldiers or places that remind them of combat, including treatment centers like the VA. It would be reasonable to conclude that a busy bar late at night may stoke a similar feeling in someone with combat-related PTSD.

This evidence provides important context for Mr. Mendoza's state of mind at the time he exited the bar and came upon H.V., who was outside the bar in his car with a gun in hand. It supports the notion that at the time he saw H.V. with a gun, Mr. Mendoza was in a state where he actually believed there was an actual or imminent unlawful interference with his person, the first subjective inquiry of the self-defense test. (Wisconsin Criminal JI 801).

Mr. Mendoza's diagnosis and the root of his state of heightened arousal – being outside of a loud, busy bar, late at night – is also directly relevant to the second-prong of the self-defense inquiry – whether Mr. Mendoza actually believed using his firearm to fire into the trunk of H.V.'s vehicle was necessary to prevent H.V. from harming him. (Wisconsin Criminal JI 801). If Mr. Mendoza was already feeling uncomfortable and like he was in a dangerous environment as he was exiting the bar, his assessment of the threat he faced when H.V. pointed a firearm at him and the need to respond would have been impacted.

Thus, this evidence would have served to "assist the jury in an area where its knowledge may be

mistaken but where the expert has special knowledge." *Id.* at 430 (citations omitted). This alternative perspective could have altered the outcome of the trial, and therefore, Mr. Mendoza was prejudiced when trial counsel did not pursue this type of defense. *Smith*, 207 Wis. 2d at 276 (citing *Strickland*, 466 U.S. at 694).

Further, Dr. Spierer's medical expertise could have offered the jury an alternative explanation for his behavior following the shooting. During closing, the State argued:

> [After the shooting,] [w]hat do they do? They go to McDonald's. Here's a man supposedly, and according to him, so terrified for his life that he had to discharge his gun 10 times into a car, and he goes to McDonald's.
>
> Does that sound like reasonable self-defense like the judge talked about?

(129:23-24).

In Dr. Spierer's report, he wrote that Mr. Mendoza's PTSD symptoms had long been documented to include emotional numbing and avoidance, detachment from others and a "restricted range of affect," characteristics consistent with his behavior the day following the incident. (85:44). This evidence was directly relevant to the State's claim that Mr. Mendoza's behavior after the shooting contradicted his claim of self-defense. It would have presented to the jury a reasonable, alternative explanation for his seemingly calm and disconnected

attitude throughout the day following the shooting and during his report to police. Again, this alternative perspective could have altered the outcome of the trial, and Mr. Mendoza was prejudiced when trial counsel did not pursue this type of defense. *Smith*, 207 Wis. 2d at 276 (citing *Strickland*, 466 U.S. at 694).

CONCLUSION

For the reasons stated, Mr. Mendoza requests that this court conclude that trial counsel was ineffective as a matter of law and that the circuit court's ruling to the contrary be overturned and the case remanded for a new trial.

Dated this 31st day of July, 2019.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 10,911 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

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

Dated this 31st day of July, 2019.

Signed:

NICOLE M. MASNICA
Assistant State Public Defender

CERTIFICATION AS TO APPENDIX

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 § 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 § 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 decisions 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 persons, 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 this 31st day of July, 2019.

Signed:

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APPENDIX

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