STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2018AP2325-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

PEDRO R. MENDOZA, III,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING POSTCONVICTION RELIEF, ENTERED IN THE MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE THOMAS J. MCADAMS, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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STATEMENT OF THE ISSUES

Was Pedro R. Mendoza's trial counsel ineffective for:

a) not objecting to the State's reference to gang affiliation and the reluctance of witnesses to testify during voir dire;

b) not presenting other-acts evidence of the victims; and

c) not introducing evidence of Mendoza's post-traumatic stress disorder (PTSD) diagnosis to bolster his claim of self-defense?

Following a *Machner* hearing, the circuit court said no.

This Court should also say no.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication.

INTRODUCTION

Mendoza's appeal presents straightforward claims of ineffective assistance of counsel. Despite counsel's success at limiting evidence that Mendoza and the victim had been members of a gang in their youth, Mendoza argues counsel could have done more. And despite the postconviction court's finding that the other-acts evidence would not have been admissible, Mendoza faults counsel for not seeking its admission. And finally, despite the postconviction court's finding that it would have made no difference if Mendoza's counsel had presented the jury with Mendoza's mental health background, Mendoza says counsel should have done so.

For the same reasons Mendoza's claims failed in the postconviction court, they fail on appeal.

STATEMENT OF THE CASE[1]

In the early hours on May 4, 2014, Milwaukee Police Department Sargent Rebecca Carpenter was driving on South 35th Street when she was passed by a Chevy Vega. (R. 130:71.) The Chevy's driver gestured to get Carpenter's attention. (R. 130:71.) Carpenter moved her car to pull behind the Chevy, but the car drove off. (R. 130:72.) Carpenter noticed that part of the Chevy's driver's side window was missing. (R. 130:72.)

Shortly thereafter, Carpenter heard a call from dispatch that shots were fired in the area. (R. 1:1; 130:73.) As Carpenter headed to the reported scene, she noticed that the Chevy was now traveling behind her. (R. 130:75.) Carpenter turned around so that she could drive behind the Chevy. (R. 130:75–76.) Without having to activate her lights or sirens, the driver of the Chevy pulled over on his own. (R. 130:76.) The driver then got out of the car and Carpenter noticed that he was bleeding. (R. 130:76.) Carpenter could now tell that shots had been fired into the car. (R. 130:76–77.) Carpenter also noticed that in addition to the male driver, there was a female passenger in the car. (R. 130:77.)

Shortly thereafter, police identified the occupants of the Chevy as Leon Garcia and Nadine Ferrer.[2] (R. 131:42–43.) According to police, Garcia said that when he and Ferrer left a bar called Grady's, they got into his car, and Nadine started to vomit. (R. 131:43–44.) Garcia said that a person whom he recognized—but would not identify for police—then approached his car. (R. 131:44–45.) Garcia started to drive off, but the unnamed person stood in the middle of the street and

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[1] The facts in the statement of the case are taken largely from the trial transcripts.

[2] To comply with Wis. Stat. § 809.86(4), the State uses pseudonyms in place of the victims' names.

started shooting. (R. 131:45.) Garcia described the gun used as a .45 caliber handgun. (R. 131:45–46.)

Later that day, Mendoza turned himself into police, bringing with him the gun used in the shooting. (R. 131:74–75.) After initially denying that he knew with whom he was in an alleged shootout, he told police that Garcia had shot at him and he shot back in self-defense. (R. 132:72–75, 99–101.)[3]

The State charged Mendoza with first-degree recklessly endangering safety and endangering safety. (R. 1.) Mendoza proceeded to trial, arguing that he had acted in self-defense. (R. 128:8.)

Before trial, the State moved to admit evidence of the parties' previous affiliation with the Latin Kings gang. (R. 16.) The State argued the evidence was admissible as other-acts evidence because it was offered for a permissible purpose—to show Mendoza's motivation for shooting Garcia was relevant—and that it was not unduly prejudicial in light of its probative value explaining Mendoza's conduct. (R. 16.) The State also sought to present an expert witness to explain the Latin Kings "and their method of operation." (R. 16:5.) Mendoza objected to the State's motion, arguing that the State had not shown how the parties' affiliation with a gang was admissible for a permissible purpose or was relevant. (R. 21.) He also specifically objected to the use of the expert witness to describe the mechanics of the Latin Kings. (R. 21:6.) The court withheld its ruling on the bulk of the State's motion. (R. 128:6–7, 11, 14–15.)

During voir dire, the State told the panel that the victim and Mendoza "have an affiliation with the Latin Kings street gang and that there are witnesses who are going to be afraid to be here." (R. 130:35.) The State then asked if "anyone in the

[3] In Record 132, the electronic page numbers and transcript page numbers do not match. The State cites to the electronic page numbers for this record.

group" had "concerns about the fact that we may be hearing from some dangerous people." (R. 130:35.) At that, a potential juror nodded. (R. 130:35.) The State asked the potential juror about his or her concerns. (R. 130:35.) The potential juror responded that "announc[ing] here where you live, your names, your family members, and then you're talking about street gangs so obviously then it's common knowledge." (R. 130:36.)

At trial, Ferrer testified that she and her fiancé, Garcia, were out in Milwaukee on May 4, 2019, when they got a call from a cousin asking them to stop by Grady's bar. (R. 131:4–7.) When they got to the bar, Ferrer stayed in the car, sick from cancer, while Garcia went inside to tell the cousin that they would not be coming. (R. 131:6–7.) Garcia returned to the car and closed the door. (R. 131:9.) Ferrer then felt something hit her in the back of the head and push her to the ground. (R.131:9.) She soon realized that it had been Garcia's hand, and he was telling her to stay down. (R. 131:9.) When she looked up, she saw a man standing in front of them, shooting at them. (R. 131:9.)

Garcia testified similarly: he and Ferrer stopped by Grady's on May 4, and Ferrer stayed in the car while he briefly went inside. (R. 131:29.) But when the State asked Garcia, "What happened after you left the bar," Garcia replied, "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." (R. 131:29.) At this, Mendoza objected, and the court sustained the objection. (R. 131:29–30.) The State then asked Garcia if there was a reason why he did not want to answer the question. (R. 131:30.) Garcia said, "Of course." (R. 131:30.) Mendoza again objected. (R. 131:30.)

The State turned to Garcia's relationship with Mendoza. (R. 131:30.) It asked if Garcia knew Mendoza, and Garcia admitted he did. (R. 131:30.) Garcia said that he had

known Mendoza for "40 years probably." (R. 131:30.) The State asked if he and Mendoza had "participate[d] in any particular activities together." (R. 131:30.) Garcia replied, "We grew up in the same neighborhood." (R. 131:30.) The State then asked, "Are you both members of the Latin Kings street gang?" (R. 131:31.) Mendoza successfully objected. (R. 131:31.)

Mendoza testified that as a result of the shooting, he was injured from glass from his car and bullet fragments. (R. 131:33.) He said that he had had bullet fragments removed from his shoulder. (R. 131:36.) He concluded his direct testimony by agreeing with the State that he was not testifying by his choice. (R. 131:33.)

Samantha Hembrook, Mendoza's girlfriend, testified that around midnight on May 4, Mendoza suggested that they go to Grady's for drinks. (R. 131:52–53.) Hembrook said that she drove Mendoza and two others to the bar, but she dropped Mendoza off at the bar while she and the others went to look for parking. (R. 131:53–54.) After she found a parking spot, she called Mendoza, who said that he "wasn't feeling it," which meant that "he was getting a bad vibe." (R. 131:54–55.) Hembrook then got back in her car to go to find Mendoza. (R. 131:55.) While looking for him, she testified that she heard gunshots from two different directions. (R. 131:55–56.) Hembrook said that she then saw Mendoza and picked him up. (R. 131:56.) When Mendoza got in the car, he told her to "keep going, keep driving away." (R. 131:57.) At trial, Hembrook testified that Mendoza told her that someone was "arguing with him, and he shot in self-defense." (R. 131:57–58.) But she admitted that on the day of the crime, she did not recall telling police that Mendoza told her he had acted in self-defense. (R. 131:58.)

Milwaukee Police Detective Jason Enk testified that he interviewed Mendoza Hembrook, after Mendoza turned himself into the police station on May 4. (R. 131:74–78.) He

said that he had to interview Mendoza a second time, after he interviewed Hembrook, because Mendoza's version of events was inconsistent with Hembrook's version. (R. 131:78; 132:23.) The State played portions of the interviews for the jury.[4] (R. 131:78–85.) Enk explained that it was not until the second interview that Mendoza admitted that he knew who was in the car at which he had shot. (R. 131:86.)

Milwaukee Police Officer Jolene Reyes testified that she was sent to the crime scene on May 4. (R. 132:29–30.) Reyes said that police recovered ten bullet casings from the scene and two bullet fragments. (R. 132:33, 40–41.) All of the bullet casings were from the same caliber gun: a .45 caliber. (R. 132:41.) She said that there were four bullet holes in Garcia's Chevy, and they were all consistent with being fired from outside of the car. (R. 132:39, 42.) Reyes testified that she found no guns, casings, holsters, or ammunition in the car. (R. 132:43.)

Mendoza also testified. (R. 132:67.) Mendoza said that he had been in the army for four years and had served in combat in Iraq. (R. 132:67–68.) He said that during his time in Iraq, he had both fired a gun and been fired upon. (R. 132:68.)

Turning to the day of the crime, Mendoza explained that when he saw Garcia get into his car, he walked over to it to see if everything was okay. (R. 132:72–73.) But before Mendoza got to Garcia's car's window, "it shot out. [Garcia] started shooting at" Mendoza. (R. 132:73.) He denied saying anything that could have provoked Garcia into shooting at him, saying that he "didn't even get to tell him anything." (R. 132:73.)

[4] The interview recordings are in the record at R. 139, Exhibit 30. But the State was unable to listen to the recordings on its computer.

Mendoza admitted that when Enk first interviewed him, he did not tell him the "whole truth." (R. 132:77.) Mendoza admitted that he lied to Enk about not seeing whom he alleged had fired the first shots because he "didn't want to get someone in trouble."[5] (R. 132:99–101.)

After the close of evidence, the parties and the court discussed the jury instructions. (R. 132:111–18; 133:2–4.) As relevant here, the court told the jury, "During the trial, certain evidence was introduced that during the 1990's, some members of a street gang known as the Latin Kings, were prosecuted for criminal activities. Further, both [Garcia] and Mr. Mendoza acknowledged having a past affiliation with that gang." (R. 133:16.) The court then informed the jury, "This evidence was admitted to establish that [Garcia] and Mr. Mendoza were familiar with one another, prior to the events of May 4 of 2014." (R. 133:17.) But the court cautioned that the jury that it "may consider this evidence and give it the weight if any, [it] feel[s] it deserves. However, [it] must not infer that gang affiliation has any bearing on the issues of this case, unless [it] determine[s] that such inferences, are supported by additional independent evidence admitted during this trial." (R. 133:17.)

The jury found Mendoza guilty of first-degree recklessly endangering safety and endangering safety. (R. 54.) The court sentenced him to a total term of eight years' initial confinement, to be followed by two years' extended supervision. (R. 64.)

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[5] In his brief, Mendoza asserts that he told Enk during his "initial interview" that Garcia had pulled a gun on him. (Mendoza's Br. 3–4.) Perhaps Mendoza considers both interviews with Enk his "initial interview," but Enk and the video evidence made clear that there were two separate interviews with Mendoza on May 4, 2019. (R. 131:76–86; 132:23.) And it was only in the second interview that Mendoza identified whom he alleged had shot at him. (R. 131:86.)

Mendoza moved for postconviction relief. (R. 85.) He argued that he was entitled to a new trial because his counsel was ineffective or, in the alternative, he was entitled to resentencing. (R. 85.) He argued that counsel was ineffective for not challenging the State's reference to the Latin Kings and fearful witnesses at voir dire, for not submitting other-acts evidence about the victims, and for not presenting evidence of his mental health issues related to his time in the military. (R. 85:1.) Alternatively, he argued that he should be resentenced because the court had not heard about "his longstanding diagnosis of combat-related post-traumatic stress disorder (PTSD) and that this information would have helped the court" understand Mendoza's behavior. (R. 85:2.)

Following a *Machner* hearing, the circuit court concluded that Mendoza had not shown any prejudice from trial counsel's actions. (R. 137:27.) Thus, the court denied Mendoza's motion for a new trial. (R. 137:27; 142.) But the court was persuaded by Mendoza's arguments concerning sentencing and said it was "left with the sinking feeling . . . that the best result was not achieved." (R. 137:27.) Ultimately, the court concluded that trial counsel was ineffective at sentencing and ordered resentencing. (R. 137:31–32, 34.) Following a second sentencing hearing, the court imposed a term of three years and two months' initial confinement, to be followed five years' extended supervision. (R. 112; 138:37.)

Mendoza appeals from his judgment of conviction and the order denying his postconviction motion. (R. 117; 142.)

STANDARD OF REVIEW

A circuit court's decision on "the effectiveness of counsel involves a mixed question of fact and law." *State v. Floyd*, 2016 WI App 64, ¶ 23, 371 Wis. 2d 404, 885 N.W.2d 156. This Court upholds "factual determinations of the circuit court unless they are clearly erroneous; however, whether trial

counsel's performance was deficient and prejudiced the defendant are questions of law" this Court reviews independently. *Id.*

ARGUMENT

Mendoza has not established that his trial counsel was ineffective.

A. Law related to claims of ineffective assistance of counsel.

Wisconsin applies *Strickland*'s[6] two-part test to evaluate a defendant's claim that his counsel was ineffective. *State v. Roberson*, 2006 WI 80, ¶ 28, 292 Wis. 2d 280, 717 N.W.2d 111. To succeed on such a claim, the defendant must show that counsel's performance was deficient and that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). If a defendant fails to prove either prong of the test, the court need not address the other. *Floyd*, 371 Wis. 2d 404, ¶ 22 (citing *Strickland*, 466 U.S. at 697).

The reviewing court must be highly deferential. *Strickland*, 466 U.S. at 689. This is because "[i]t is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." *Id*. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.* The "court must indulge a strong presumption that

[6] *Strickland v. Washington*, 466 U.S. 668 (1984).

counsel's conduct falls within the wide range of reasonable professional assistance." *Id.*

In evaluating the prejudice prong of *Strickland*, this Court determines whether the defendant has proven that his attorney's errors "actually had an adverse effect on the defense." *Id.* at 693. The defendant cannot meet his burden by merely showing that the errors had "some conceivable effect on the outcome"; rather, he must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 693–94. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

B. Mendoza has not shown that his attorney was ineffective for not objecting to the State's reference to gangs during voir dire.

During voir dire, the State told the jury panel that it was "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." (R. 130:35.) The State then asked if, "[h]earing that, is there anyone in the group who has concerns about the fact that we may be hearing from some dangerous people?" (R. 130:35.) One juror answered, "Yes," and then explained that announcing "where you live, your names, your family members, and then you're talking about street gangs so obviously then it's common knowledge." (R. 130:35–36.) When the State asked the panel if any other potential jurors had similar concerns, members nodded and one said, "That's a very valid point." (R. 130:36.)

Shortly thereafter, the State turned to the theme of reluctant witnesses. (R. 130:38.) The State told the panel that it would "hear from the witnesses who don't want to be here" because "[t]hey're concerned about their safety and what's

going to happen." (R. 130:38.) It asked the panel if they understood that testifying "can be a stressful situation for [witnesses] and that it's a human reaction not to want to point fingers at other people if they're concerned for their safety." (R. 130:38.) The jurors nodded in response. (R. 130:38.)

Mendoza was represented by Eugene Detert at trial. (R. 130:4–5; 135:4.) When Detert asked the panel questions, he told the potential jurors that he was "a little concerned about the manner in which [they] were told about the fact that some people are—Some people who [they're] going to hear about in this case are dangerous." (R. 130:44–45.) Detert asked the panel if there was anyone who felt that they could not be fair to the parties after "having heard that there's some gang affiliation and that there's dangerous people involved." (R. 130:45.) Two jurors expressed their discomfort at learning that the case involved gang members. (R. 130:44–46.) There is no evidence that any of the jurors who expressed discomfort sat on Mendoza's jury. (R. 130:35–50; 135:23.)

At the *Machner* hearing, Mendoza asked Detert about his strategy concerning the gang evidence. (R. 135:6–10.) Detert replied that he had opposed the State's efforts to admit evidence of Mendoza's affiliation with the Latin Kings. (R. 135:6–7.) But Mendoza pressed Detert on how the affiliation "came in during voir dire," questioning why Detert did not object to the State's references during this period. (R. 135:7–10.) Mendoza reminded Detert that his other objections to the gang evidence had been "largely sustained," suggesting that an objection at voir dire may have been as well. (R. 135:9–10.)

Trial counsel testified that he believed that all potential jurors who had expressed any fear during voir dire had been struck from the panel. (R. 135:23.) Counsel said that he was "almost a hundred percent sure [he] didn't leave any jurors on who said they were afraid because of the gang affiliation." (R. 135:24.)

The circuit court found that the State's reference to the gang affiliation at voir dire was the State's effort to "explain to the jury why [its witnesses] were reluctant" to testify. (R. 137:23.) The State had wanted "to present context for these people on the jury of why these people who had been shot at were reluctant" to testify against Mendoza. (R. 137:24.) The court said that even though the State's questions during voir dire were appropriate, Mendoza was "overdramatizing the impact of" it. (R. 137:24–25.) In other words, the court found that even if the State had not asked the jury questions he now complains about, it could not "see how it would have made a difference in this case." (R. 137:27.)

Mendoza's argument on appeal on this ground is confusing. He repeatedly refers to the "admission of testimony" and "evidence" concerning Mendoza's previous affiliation with the Latin Kings, but he frames the issue as a question of counsel's performance during voir dire, and the only parts of the record to which he points to complain concern voir dire.[7] And questions during voir dire are neither evidence nor testimony. Further, during the postconviction hearing, Mendoza conceded that his trial objections to the gang evidence were "largely sustained." (R. 135:9–10.) He does not point to an objection that should have been granted but was not. Thus, the State must assume that Mendoza means to complain only about the State's questions during voir dire.

With the focus now on the limited questions the State asked potential jurors about gangs and reluctant witnesses, it is clear that Mendoza has failed to show any prejudice from his counsel's lack of objection. First, Mendoza has not alleged—much less shown—that any member of his jury panel was one of the jurors who expressed discomfort in the wake of the State's questions. Second, Mendoza has not made

[7] Mendoza's Br. 29–34.

any effort to show how the result of the trial would have been different absent the State's questions.

If an objection to the State's questions had succeeded—or if the State had never mentioned the Latin Kings or asked the panel about its understanding of fearful or reluctant witnesses—it is not reasonably probable to believe that the jury would have found that Mendoza acted in self-defense. As stated, there is no evidence that any juror uncomfortable with the gang evidence or the reluctant witnesses sat on Mendoza's jury. Further, and perhaps more importantly, the evidence against Mendoza would have been the same absent the State's voir dire.

The jury would have heard the same evidence if it had not been asked about gang affiliation or reluctant witnesses: Mendoza fled the scene of the crime, whereas Garcia and Ferrer returned to it. (R. 130:72–79.) Garcia had been injured from bullet fragments and glass, and Garcia's car had been shot. (R. 131:15–16; 132:39, 47.) The only bullet casings found at the scene were from a .45 caliber gun, which was the same gun that Mendoza turned into police. (R. 132:41, 75–76.) Although Garcia was not forthcoming and a reluctant witness, Mendoza's story was inconsistent, and he admitted that he had lied to police. (R. 131:42–44; 132:99–101.) Finally, police did not find a gun or ammunition on Garcia, Ferrer, or in the Chevy. In fact, there was no evidence of any gun other than Garcia's at the scene. (R. 132:43.) Thus, even absent the State's questions at voir dire, there is no reasonable probability that the jury would have returned a different verdict. *See Strickland*, 466 U.S. at 693–94. And without this probability, Mendoza has not shown that his trial counsel was ineffective. *See id.*

C. Mendoza has not shown that his attorney was ineffective for choosing not to present other bad acts of the victims.

1. Relevant law related to other-acts evidence.

Other-acts evidence is governed by Wis. Stat. §§ 904.04(2) and 904.03. *State v. Sullivan*, 216 Wis. 2d 768, 781, 576 N.W.2d 30 (1998). To determine whether other-acts evidence is admissible, the court must first determine whether it is offered for a permissible purpose, "such as to establish motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." *Id.* at 783.

The second step in the analysis asks whether the evidence is relevant. *Id.* at 785. Relevancy is a two-part question. *Id.* It first asks "whether the evidence relates to a fact or proposition that is of consequence to the determination of the action." *Id.* Next, it assesses the probative value of the evidence. *Id.* at 786. This assessment "depends on the other incident's nearness in time, place and circumstances to the alleged crime or to the fact or proposition sought to be proved." *Id.* "The stronger the similarity between the other acts and the charged offense, the greater will be the probability that the like result was not repeated by mere chance or coincidence." *Id.* at 786–87.

The final step in the three-step inquiry requires the court to "weigh[] the probative value of the other-acts evidence against the danger of unfair prejudice, confusion of the issues, or misleading the jury, or considerations of undue delay, waste of time or needless presentation of cumulative evidence." *Id.* at 789.

2. Relevant facts.

At trial, Mendoza argued Garcia shot at him, and that he returned fire only after that. (R. 132:72–73.) He theorized that the police did not find a gun on Garcia or in his car because Garcia was able to get rid of it after he left the crime scene, but before he returned. (R. 133:38–39.) He used Garcia's failure to cooperate at the scene to support this theory. (R. 133:39.)

But in the postconviction proceedings, Mendoza contemplated that because Garcia and Ferrer were both felons, they would have had an added incentive to unload the gun: they did not want to be charged with being felons in possession. (R. 135:14; 137:13.) Utilizing this new theory, Mendoza complained that trial counsel should have explored the victims' criminal backgrounds, discovered that they were both felons, and presented that evidence to the jury. (R. 135:14–16.)

To that end, counsel asked trial counsel—Detert—about his investigation into the victims' backgrounds. (R. 135:10.) Detert said that Garcia "refused to talk to anybody on either side of the case." (R. 135:10.) With regard to Garcia's criminal history, Detert said that he had read some criminal complaints, but that he did not have access to any federal indictments and knew only of the federal court decision that referenced Garcia that the State had provided pretrial. (R. 135:12.) But Detert admitted that he knew that there were "prior dismissals of criminal allegations against [Garcia] from his time in the Latin Kings," though he did not seek admission of the evidence as other-acts evidence. (R. 135:12.)

Detert said that he learned from newspaper articles that Ferrer had been involved in a case in which her boyfriend had shot a police officer. (R. 135:11.) Detert explained that as a result of that case, his understanding was that Ferrer had

been accused of conspiring to testify falsely at her boyfriend's trial, though Detert said he did not remember that Ferrer had also been accused of falsifying records in an attempt to see her boyfriend in jail. (R. 135:13–14.) But Detert said that although he knew of some of Ferrer's history, he "didn't feel that there was a way [he] was gonna be able to get that information in front of this jury as relevant to this case." (R. 135:11.)

As evidentiary support of the victims' other bad acts, Mendoza submitted with his postconviction motion a 1993 complaint, charging Garcia with two counts of witness intimidation; a 1994 complaint charging Garcia with one count of witness intimidation; a 2009 complaint charging Ferrer with seven counts of felony bail jumping; and a 2014 temporary restraining order against Garcia from his ex-girlfriend. (R. 85:21–35.)

But the court concluded that postconviction counsel's criticisms were unpersuasive for two reasons. (R. 137:25–26.) One, the other-acts evidence that postconviction counsel asserted Detert should have presented would not have been admissible at trial. (R. 137:25–26.) And even if the evidence had been admitted, it would have shown only that the victims were "people that have problems." (R. 137:25.) The court said,

> [T]hese are two people who got shot at. And to cross-examine them about things that happened years ago and restraining orders where the standard is so low, I—I don't know that that would have been a very useful exercise even if it came in. And it may have only generated sympathy for these people who got shot at.

(R. 137:25–26.) In other words, its admission would have had no different effect on the jury so that its absence did not prejudice Mendoza. (R. 137:25–26.)

3. Mendoza has not shown that counsel was ineffective because the other-acts evidence would not have been admissible.

On appeal, Mendoza offers no reasons for this Court to reach a conclusion other than that reached by the circuit court. Mendoza argues that trial counsel should have sought to admit the other-acts evidence under Wis. Stat. § 904.04(2)(a).[8] According to Mendoza, all of the other-acts evidence was relevant and admissible for a permissible purpose.[9] And, Mendoza says, the probative value is not outweighed by its prejudice.[10] The State disagrees.

First, Mendoza attempts to argue that the other-acts evidence was relevant to counter the State's implication that the victims were scared to testify.[11] But Mendoza fails to explain how allegations that Garcia previously intimidated a witness or had a restraining order against him from an ex-girlfriend rebuts evidence that he was then-currently scared to testify against the man who shot him.[12] Similarly, he makes no showing how Ferrer's bail jumping counts related

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[8] Mendoza's Br. 39.

[9] Mendoza's Br. 36–43.

[10] Mendoza's Br. 43–45.

[11] Because Mendoza starts his argument with relevancy—as opposed to the traditional "permissible purpose" first step in the *Sullivan* inquiry—the State follows suit. Mendoza's Br. 36–38.

[12] Mendoza also submitted evidence that Garcia's ex-girlfriend obtained a temporary restraining order against him, and Mendoza wanted the order used as other-acts evidence against Garcia. (R. 85:27–29.) For brevity's sake, and because Mendoza seems to consider all of the evidence as one piece, the State refers to all of the other-acts evidence together.

to her aiding her ex-boyfriend in his criminal pursuit rebutted her fear of testifying in this case.[13]

Mendoza also seems to argue that the evidence was relevant because it would shed light on the victims' initial reluctance to report the shooting and their uncooperative behavior at the crime scene.[14] Mendoza says, "The State argued to the jury that the only reason [Garcia] did not want to answer questions at the trial was because he feared Mr. Mendoza."[15] But Mendoza does not explain how the other-acts evidence would offer the jury a different explanation for Garcia and Ferrer's reluctance to cooperate. That Garcia and Ferrer had a criminal background does not explain why they would be reluctant to testify against Mendoza, or why they would fear testifying against him.

Given this, Mendoza has not shown how the other-acts evidence relates to any fact of consequence. *See Sullivan*, 216 Wis. 2d at 785. The issue at trial was whether Mendoza acted in self-defense. None of the evidence that Mendoza now argues should have been admitted relates to this issue. Moreover, none of this evidence would have had probative value. *Id.* at 786. The other-acts evidence Mendoza submitted does not mimic the facts of the crime. *See id.* In addition, the witness intimidation charges were filed 21 years before the current crime. *See id.* (stating that to be probative, evidence must be near in time, place and circumstance). Here, there are no similarities between the other acts and the crime charged, other than that they all involve alleged bad acts. *See id.* Thus, Mendoza failed to prove the other acts probative value relative to this case. *Id.* at 786–87.

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[13] Mendoza's Br. 36–38.

[14] Mendoza's Br. 38.

[15] Mendoza's Br. 38.

Thus, Mendoza has not explained how any of the other-acts evidence was relevant to the issue at trial, which was whether Mendoza acted in self-defense. The inquiry ends there. Afterall, if the evidence is not relevant, it is not admissible. Wis. Stat. § 904.02. And if it was not admissible, trial counsel was not ineffective for failing to seek its admission. *See State v. Wheat*, 2002 WI App 153, ¶ 14, 256 N.W.2d 270, 647 N.W.2d 441.

4. Even if the other-acts evidence had been admitted, Mendoza failed to prove prejudice.

Even if the circuit court admitted the other-acts evidence in some form, Mendoza has failed to show any prejudice from its absence. He argues only that had the jury heard the evidence, it "would have had a very different lens through which to view [Garcia] and [Ferrer's] behavior and testimony at trial."[16] This assertion fails to explain how the result of the proceeding would have been different.

Mendoza offers no explanation for why jury's learning that that Garcia and Ferrer each had past history in the criminal justice system would have resulted in the jury finding that Mendoza acted in self-defense. The other-acts evidence had no bearing on the physical evidence, which showed bullet holes only in Garcia's car and bullet fragments in Garcia's body. (R. 131:15, 18–19, 24–25.) And it showed bullets only from a gun like Mendoza's gun at the scene. (R. 132:41.) There was no evidence that Mendoza acted in self-defense other than his own self-serving statement. The other-acts evidence had no bearing on this evidence—which is why it was not relevant—so there is no reasonable probability that its inclusion would have altered the trial result. *See Strickland*, 466 U.S. at 693–94.

[16] Mendoza's Br. 45.

D. Mendoza has not shown that his attorney was ineffective for choosing not to present evidence of his PTSD.

1. Legal principles concerning claims of perfect self-defense at trial.

Mendoza placed perfect self-defense at issue in this case. (R. 133:3.) In the case of perfect self-defense, a defendant may threaten or intentionally use force that is intended to cause death or great bodily harm against another person only when the defendant reasonably believes that the force used was necessary to prevent imminent death or great bodily harm to himself. (R. 133:13–14.) Wis. JI–Criminal 805 (2005). The reasonableness standard "is what a person of ordinary intelligence and prudence would have believed in the defendant's position under the circumstances that existed at the time of the alleged offense." *Id.*

2. Additional relevant facts.

In his postconviction motion, Mendoza argued that his trial counsel should have presented evidence of his "long standing history of post-traumatic stress disorder and how that diagnosis could affect his perceptions and reaction on the night of the shooting, bolstering his defense that he believed he needed to fire to act in self-defense." (R. 85:1.)

At the *Machner* hearing, Detert acknowledged that he had known that Mendoza suffered from PTSD as a result of his time spent in Iraq. (R. 135:17.) Detert said that he had reached out to the Veteran's Administration in an attempt to find a doctor to testify on the effect Mendoza's condition had on him, but Detert was unsuccessful in getting cooperation from the VA. (R. 135:17–18.) Detert also said that although he talked to colleagues about the issue, "[n]o one seemed to know anyone who had been qualified in that area." (R. 135:18.)

The postconviction court concluded that Detert's performance concerning PTSD had been deficient and prejudicial vis-à-vis Mendoza's sentencing, but that it had no effect on the trial. (R. 137:26–27, 31–32, 34.)

3. Mendoza has not shown that his counsel's decision not to present evidence of his PTSD to the jury was prejudicial.

Mendoza argues that the lack of evidence of his PTSD was prejudicial because the evidence "supports the notion that at the time [Mendoza] saw [Garcia] with a gun, Mr. Mendoza was in a state where he actually believed there was an actual or imminent unlawful interference with his person."[17] He continues, "Mr. Mendoza's diagnosis . . . is directly relevant [to] . . . whether Mr. Mendoza actually believed using his firearm to fire into the trunk of [Garcia's] vehicle was necessary to prevent [Garcia] from harming him."[18] But this argument ignores the evidence and the law.

Here, the State had to prove that Mendoza did not act in self-defense. (R. 133:14.) Assuming that the jury had heard all of the evidence that it heard, and also heard that Mendoza suffered from PTSD, there is no reasonable probability that it would have found that the State had not proven that Mendoza had not acted in self-defense. *See* Wis. JI–Criminal 805 (2005). In other words, the verdict would have been the same. This is because the jury knowing that Mendoza suffered from PTSD does not change that Mendoza fled the scene, lied to police, and had the only gun that matched the type of casings found at the scene. (R. 132:41, 99–101.) It does not alter that Garcia—not Mendoza—was wounded from bullet fragments and glass; it was Garcia's car that had bullet holes in it; and

[17] Mendoza's Br. 50.

[18] Mendoza's Br. 50.

it was Garcia who returned to the crime scene voluntarily. (R. 130:77; 131:24–25, 44.) Mendoza's diagnosis does not change the physical evidence or the additional evidence from which the jury rejected his self-defense claim. And had it heard this evidence, there is no reasonable probability that the jury's verdict would have changed. Without a reasonable probability of a different result, trial counsel was not ineffective for declining to put on this evidence.[19] *Strickland*, 466 U.S. at 693–94.

[19] Counsel was also not deficient for not submitting this evidence. Counsel testified that he made a good faith effort to attempt to secure a witness who could testify to Mendoza's diagnosis, but he was unable to find one. Mendoza has not shown how counsel's effort fell below the constitutional standard. *Strickland v. Washington*, 466 U.S. 668, 689 (1984). But because Mendoza's claim fails on the prejudice prong, this Court need not address counsel's performance. *State v. Floyd*, 2016 WI App 64, ¶ 22, 371 Wis. 2d 404, 885 N.W.2d 156 (citing Strickland, 466 U.S. at 697).

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court affirm the judgment of conviction and the order denying postconviction relief.

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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 6344 words.

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KATHERINE D. LLOYD
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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 27th day of November 2019.

_____
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