RECEIVED
03-19-2020
CLERK OF COURT OF APPEA
OF WISCONSIN

STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2018AP2325-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

PEDRO R. MENDOZA III,

Defendant-Appellant.

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

---

REPLY BRIEF OF DEFENDANT-APPELLANT

LEON W. TODD
Assistant State Public Defender
State Bar No. 1050407

Office of the State Public Defender
735 North Water Street, Suite 912
Milwaukee, WI 53202
(414) 227-4805
toddl@opd.wi.gov

Attorney for Defendant-Appellant

TABLE OF CONTENTS

Page

ARGUMENT 1

I. Trial counsel was ineffective for failing to contemporaneously object to impermissible gang-related other evidence and information. 2

II. Trial counsel was ineffective for failing to present other acts evidence showing that H.V. and M.C.M. had the motive, intent, and opportunity to falsely deny that H.V. had a gun and instigated the violence by shooting at Mr. Mendoza first. 6

III. Trial counsel was ineffective for failing to introduce expert testimony regarding Mr. Mendoza's combat-related PTSD in support of his self-defense claim. 10

CONCLUSION 13

CERTIFICATION AS TO FORM/LENGTH 14

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12) 14

CASES CITED

Brown County DHS v. Terrance M.,
2005 WI App 57,
280 Wis. 2d 396, 694 N.W.2d 458 2

State v. Burton,
2007 WI App 237,
306 Wis. 2d 403, 743 N.W.2d 152 6

State v. Louis,
156 Wis. 2d 470, 457 N.W.2d 484 (1990) 5

State v. Sullivan,
216 Wis. 2d 768, 576 N.W.2d 30 (1998) 9

United States v. Harris,
587 F.3d 861 (7th Cir. 2009)..... 6

CONSTITUTIONAL PROVISIONS AND STATUTES CITED

United States Constitution
U.S. CONST. amend. VI 5

U.S. CONST. amend. XIV 5

Wisconsin Statutes
§ 904.04(1)(b) 8

§ 906.08(2) 8

ARGUMENT

Trial counsel made three critical errors in this case: (1) he failed to contemporaneously object to irrelevant and dated gang-related information and evidence concerning Mr. Mendoza; (2) he failed to present other acts evidence showing H.V. and M.C.M. had the motive, intent, and plan to falsely claim that H.V. did not have a gun and that Mr. Mendoza shot first; and (3) he failed to introduce evidence about Mr. Mendoza's combat-related post-traumatic stress disorder (PTSD) to support of his self-defense claim.

These errors, individually and collectively, allowed the State to establish a false narrative at trial, one that portrayed Mr. Mendoza as a dangerous and violent person—one who shot at unarmed people for no apparent reason and who people were afraid to testify against.

The reality was quite different. Mr. Mendoza is a combat veteran who had a lawful concealed carry license at the time of the incident. (132:67-70). H.V. and M.C.M., on the other hand, were convicted felons (135:14), so they could not legally possess a firearm. H.V. and M.C.M. thus had a clear motive to falsely claim that H.V. never possessed a gun and that Mr. Mendoza shot at them for no apparent reason. And, as demonstrated by other acts evidence concerning H.V. and M.C.M., conspiring to manipulate the criminal justice system to suit their interests was something that H.V. and M.C.M. had both done before.

Accordingly, had trial counsel made the appropriate objections and introduced the evidence noted above, the jury would have learned the truth about what happened in this case—that Mr. Mendoza acted in self-defense—and it would have correctly found him not guilty.

I. Trial counsel was ineffective for failing to contemporaneously object to impermissible gang-related other evidence and information.

In its response brief, the State does not dispute Mr. Mendoza's argument that information and evidence concerning his dated affiliation with the Latin Kings was irrelevant and inadmissible. (*See* Resp. Br. at 10-13). The State should therefore be deemed to have admitted this argument. *See Brown County DHS v. Terrance M.*, 2005 WI App 57, ¶13, 280 Wis. 2d 396, 694 N.W.2d 458 ("Arguments not refuted are deemed admitted.").

Instead, the State argues that trial counsel's failure to object to the gang-related information was not prejudicial. (Resp. Br. at 12-13). In doing so, the State asserts that Mr. Mendoza's claim is limited to his attorney's performance during voir dire. (*Id.* at 12). That is not accurate.

In support of his first ineffectiveness claim, Mr. Mendoza described in his brief-in-chief how the State brought up his membership in the Latin Kings on multiple occasions throughout the trial. In addition, the State asserted or implied through its questions numerous times that Mr. Mendoza was a violent individual and someone to be feared. This occurred throughout the course of the trial as follows:

- Throughout two separate lines of questioning during voir dire (BIC at 7-10);
- During the testimony of M.C.M. (*id.* at 10-11);
- During the testimony of H.V. (*id.* at 11-13);
- During the testimony of Officer Keith Miller (*id.* at 13-15);
- During the testimony of Detective Jason Enk (*id.* at 15-17);
- In playing the video of Mr. Mendoza's initial police interview (*id.*); and
- During the State's closing argument (*id.* at 18-20).

The gang-related information therefore permeated the entire trial. Trial counsel, however, only objected contemporaneously to this information three times—during the testimony of M.C.M., H.V., and Officer Miller. (131:4-5, 29-31, 44-45). Trial counsel should have contemporaneously objected to any mention of Mr. Mendoza's dated gang affiliation from the very beginning during voir dire and, if necessary, to any subsequent piece of testimony or reference to this information during the trial. He failed to do so during voir dire (130:35-36), during the testimony of Detective Enk (131:80), during the playing of the video of Mr. Mendoza's police interview (131:79-80), and during the State's closing argument. (133:23, 27-28, 33-34). These failures constituted deficient performance.

Had trial counsel properly objected to this information starting in voir dire, it is likely the circuit court would have sustained the objection, given that the court later prohibited the introduction of this evidence at trial. (*See* 132:7, 11). At that time, counsel should have made a motion to strike the jury panel and have a new panel brought in, one free from knowledge of impermissible gang evidence. Those actions would likely have prevented any further mention by the State of gang information during the remainder of the trial. That would have avoided the need for a curative jury instruction on gang-related evidence. (*See* 133:16-17).

The State argues that trial counsel's failures in this respect were not prejudicial because, even without the improper gang information, the evidence against Mr. Mendoza would have been exactly the same. The State also notes that none of the prospective jurors who expressed discomfort about the gang information during voir dire actually served on the jury. (Resp. Br. at 12-13).

These arguments fail for numerous reasons. First, the State's claim that the evidence would have been exactly the same is untrue. Evidence of Mr. Mendoza's gang affiliation was presented during the testimony of Detective Enk and when the State played the video of Mr. Mendoza's police interview. (131:79-80).

Furthermore, although the other evidence in the case would have remained unchanged, that evidence was not as strong as the State suggests. For instance, the State is incorrect that "there was no evidence of any gun other than [Mr. Mendoza's] at

the scene." (*See* Resp. Br. at 13). Mr. Mendoza specifically testified that H.V. had a gun and shot at him. (132:73-74). H.V. also had motive and opportunity to get rid of his gun before returning to the scene. H.V. and M.C.M. were both legally prohibited from possessing a firearm by virtue of their felon status, so they had every reason to deny having a gun. They also initially fled the scene right after the shooting. In fact, they sped away from the first traffic officer they saw before later making contact with police, thereby giving them the opportunity to get rid of a firearm. (130:71-76). Also, although "[t]he only bullet casings found at the scene were from" a gun similar to Mr. Mendoza's (Resp. Br. at 13), it should be noted that certain guns, like revolvers, do not eject casings when they are fired. (132:53-54).

In addition, even if none of the prospective jurors who expressed concern ultimately served on the jury, the fact remains that the introduction of the gang information subverted Mr. Mendoza's right to a fair trial by an impartial jury as guaranteed by the Sixth and Fourteenth Amendments. *See State v. Louis*, 156 Wis. 2d 470, 478, 457 N.W.2d 484 (1990). The State exposed the entire jury panel to Mr. Mendoza's prior gang affiliation from the very beginning of the case. It also repeatedly alleged that Mr. Mendoza was a dangerous individual and someone to be feared. Courts have long acknowledged that "[e]vidence of gang membership can be inflammatory, with the danger being that it leads the jury to attach a propensity for committing crimes to defendants who are affiliated with gangs or that a jury's negative feelings toward gangs will influence its verdict. Guilt by association is a genuine concern

whenever gang evidence is admitted." *United States v. Harris*, 587 F.3d 861, 867 (7th Cir. 2009) (internal quotations and citations omitted); *see also State v. Burton*, 2007 WI App 237, 306 Wis. 2d 403, 743 N.W.2d 152.

In this case, information about Mr. Mendoza's affiliation with the Latin Kings was highly prejudicial. It touched every part of the trial, from voir dire to closing arguments. It invited the jury to speculate that Mr. Mendoza was guilty of the alleged crimes because he has an association with a gang, and thus likely has a propensity to commit violent crimes and intimate witnesses. That type of information is so inflammatory that it is prejudicial as a matter of law and cannot be cured by a cautionary jury instruction.

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

The State argues that Mr. Mendoza has not shown how the other acts evidence pertaining to H.V. and M.C.M. was admissible for an acceptable purpose or relevant. (Resp. Br. at 17-19). Mr. Mendoza's initial brief, however, describes in detail the numerous ways in which this evidence was both admissible and relevant. (BIC at 36-45).

First, H.V.'s and M.C.M.'s status as convicted felons was admissible and relevant to show motive. (135:14). Their felon status made it illegal for them to possess a firearm. Admitting to possessing a firearm

would thus have subjected both them to potential criminal prosecution. This provided a strong motive for the couple to lie about having a gun. It also accounts for their initial reluctance to report the shooting or cooperate with law enforcement. It further explains why they initially fled the scene and sped away from the first officer they saw—to give them a chance to dispose of the firearm.

Second, the other acts evidence was admissible and relevant to rebut the State's repeated suggestion that participating in the prosecution and testifying against Mr. Mendoza was "the scariest thing" that H.V. and M.C.M. had ever done. (133:27; *see also* 130:35-36, 38, 131:4-5, 42, 44-45). Evidence of H.V.'s and M.C.M.'s others acts makes it clear that they have regularly engaged in dangerous and illegal behavior that contradicts this suggestions. This evidence establishes that they are not the type of people who would be afraid to testify against someone else; they are the type of people who make *others* afraid to testify against them.

According to the affidavit accompanying his ex-girlfriend's request for an injunction, H.V. specifically stated that he was not even afraid of the police or the possibility of going to jail. He also beat and threatened his ex-girlfriend repeatedly with no fear or regard for the consequences. (85:27-29).

In addition, H.V. was criminally charged with threatening to kill the mother of a child victim of sexual assault, allegedly breaking into her home and demanding that she not pursue a case against his friend and fellow gang member. (85:21-26).

M.C.M. had similarly engaged in threats of violence toward others, according to the criminal complaint in her 2009 bail jumping case. (85:30-35). That complaint notes that M.C.M. stated "they better not fuck with [her then-boyfriend]" or she will go "hurt all of them." (85:34). While it is unclear if this threat is referencing the State and police officers involved in the case or others who meant her then-boyfriend harm while he was incarcerated, it nonetheless demonstrates a lack of fear of confronting others or perpetrating acts of violence against them.

Third, the evidence underlying M.C.M.'s convictions for felony bail jumping in which she conspired with her then-boyfriend to recruit witnesses to falsely testify on his behalf in a case involving the shooting and attempted murder of a Milwaukee police officer is directly relevant to her credibility and character for untruthfulness. (85:30-35). *See* Wis. Stat. § 904.04(1)(b); *see also* Wis. Stat. § 906.08(2). The complaint in that case also describes how M.C.M. engaged in a scheme of dishonesty and misrepresentation at the Milwaukee County Jail so she could meet with her then-boyfriend in person in violation of her no-contact order in a related case. (85:34-35).

H.V.'s prior attempts to intimidate witnesses and improperly sway the outcome of criminal cases are similarly relevant and admissible with respect to his character for untruthfulness. *See* Wis. Stat. § 904.04(1)(b).

Given that this case largely came down to a credibility dispute between Mr. Mendoza on the one

hand and H.V. and M.C.M. on the other, the probative value of evidence challenging H.V.'s and M.C.M.'s credibility cannot be overstated.

Fourth, the other acts evidence was admissible and relevant for establishing H.V. and M.C.M.'s intent and plan to falsely claim that H.V. did not possess a firearm and did not shoot at Mr. Mendoza first. H.V. and M.C.M. both claimed that H.V. did not have gun and that Mr. Mendoza was the initial shooter (although H.V. did not identify Mr. Mendoza by name). There are only two plausible explanations for the similarities in their testimony—either H.V. and M.C.M. were telling the truth or they conspired together with the intent and plan to frame Mr. Mendoza and falsely testify that he was the only shooter. The fact that H.V. and M.C.M. had both been previously charged and/or convicted of conspiring to get witnesses to lie and falsify testimony to suit their needs is admissible and highly relevant for the purpose of showing their intent and plan to do the same thing in this case. M.C.M.'s prior acts in particular—conspiring with a boyfriend to help him avoid a criminal conviction by way of false testimony—bears a striking similarity to her alleged conduct in this case. *See State v. Sullivan*, 216 Wis. 2d 768, 786-87, 576 N.W.2d 30 (1998) ("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.").

Finally, H.V.'s threat to shoot his ex-girlfriend—which implies possession and/or ownership of a firearm—as alleged in the affidavit of his ex-girlfriend (85:29), is relevant to Mr. Mendoza's

claim that he saw H.V. with a gun on the night of the incident in this case, a claim which H.V. denied. (131:37).

Trial counsel should have filed a motion to admit all of this other acts evidence on the grounds described above and then cross-examined H.V. and M.C.M. about these other acts at trial. This would have given the jury a number of good reasons to be highly skeptical of H.V. and M.C.M.'s claim that Mr. Mendoza shot first and that H.V. did not have a gun. This, in turn, would likely have caused the jury to believe Mr. Mendoza's testimony that H.V. shot at him first and that he shot back in self-defense. Accordingly, there is a reasonable probability that, absent trial counsel's failures to present the other acts evidence about H.V. and M.C.M., the result of the proceeding would have been different.

III. Trial counsel was ineffective for failing to introduce expert testimony regarding Mr. Mendoza's combat-related PTSD in support of his self-defense claim.

Trial counsel's failure to present expert testimony regarding Mr. Mendoza's PTSD also constituted ineffective assistance of counsel.

The State asserts in a footnote that defense counsel did not perform deficiently in this respect because his efforts to find an expert were sufficient. (Resp. Br. at 22 n.19). That is incorrect. By his own account, trial counsel wanted to retain an expert to potentially testify at trial about the effects of Mr. Mendoza's PTSD. (135:17-18). He also stated that if he would have had an expert who could have testified to the information contained in the expert

report attached to Mr. Mendoza's postconviction motion, he certainly would have used it trial. (135:33). However, all trial counsel did to try to find an expert was to contact the V.A. and consult with some of his colleagues. (135:17-18). That does not constitute reasonable efforts to find and retain an expert with knowledge of PTSD symptoms.

Trial counsel should have actually conducted his own research and investigation concerning appropriate experts in this area, and he should have attempted to contact and consult with one or more psychiatrists or psychologists with expertise regarding PTSD. Had he done so, he would have been able to find and retain an appropriate expert, like Dr. Michael Spierer, the expert retained by Mr. Mendoza's postconviction/appellate attorneys. Counsel's failure to do so constitutes deficient performance.

This failure was also prejudicial. This evidence would have provided important context for Mr. Mendoza's state of mind at the time he exited the bar and came upon H.V., which was crucial to establishing the subjective prongs of the self-defense inquiry.

This evidence would also have strengthened Mr. Mendoza's credibility in the eyes of the jury by explaining his conduct immediately after the incident. During closing arguments, the State asserted that Mr. Mendoza's actions of going to McDonald's after the shooting contradicted his claim that he feared for his life:

> [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?

(133:23-24).

In his report, Dr. Spierer noted that Mr. Mendoza's PTSD symptoms included emotional numbing and avoidance, detachment from others, and a restricted range of affect. (85:44-45). These are all characteristics consistent with his behavior following the incident. This information would thus have provided the jury with an explanation for Mr. Mendoza's seemingly calm and disconnected actions following the shooting. It also would have helped to refute the State's claim that Mr. Mendoza's actions following the incident were inconsistent with his self-defense claim.

Had the jury heard such expert testimony, it may therefore have been more inclined to believe Mr. Mendoza's testimony and disregard the State's assertions that his conduct was suspicious and inconsistent with the notion that he feared for his safety. There is thus a reasonable possibility that this testimony would have altered the outcome of the case. Trial counsel's failure to pursue this type of defense was accordingly prejudicial.

CONCLUSION

For these reasons, Mr. Mendoza respectfully requests that this court reverse the circuit court's judgment of conviction and order denying his postconviction motion, and remand the case to the circuit court for a new trial.

Dated this 18th day of March 2020.

Respectfully submitted,

LEON W. TODD
Assistant State Public Defender
State Bar No. 1050407

Office of the State Public Defender
735 North Water Street, Suite 912
Milwaukee, WI 53202
(414) 227-4805
toddl@opd.wi.gov

Attorney for Defendant-Appellant

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 2,952 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 18th day of March 2020.

Signed:

LEON W. TODD
Assistant State Public Defender