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07-01-2021
Clerk of Circuit Court
Kenosha County
2020CF000983

STATE OF WISCONSIN CIRCUIT COURT KENOSHA COUNTY

DA Case No.: 2020KN003907

STATE OF WISCONSIN

Plaintiff,

Court Case No.:

2020CF000983

vs.

KYLE H. RITTENHOUSE

DOB: 01/03/2003

Defendant.

**STATE'S MOTION TO
 ADMIT "OTHER ACTS"
 EVIDENCE**

Hon. Bruce E. Schroeder

For Official Use

PLEASE TAKE NOTICE that the State of Wisconsin, by Assistant District Attorneys Thomas Binger and Jason Zapf, hereby moves this court for the admission of Other Acts evidence in the above captioned matter. Specifically, the State moves to admit evidence that (1) the defendant assaulted a female in Kenosha on June 1, 2020 and (2) the defendant is associated with the "Proud Boys" organization, a violently racist organization.

The defendant is charged with the offenses of First Degree Reckless Homicide, First Degree Intentional Homicide, Attempted First Degree Intentional Homicide, two counts of First Degree Recklessly Endangering Safety, Possession of a Dangerous Weapon by a Person under the age of 18, and Failure to Comply with an Emergency Management Order of a State or Local Government. These offenses are alleged to have occurred on or about August 25, 2020.

Wisconsin courts utilize a three-prong test when confronted with other-acts evidence: Courts must determine (1) whether the act offered is for a permissible purpose pursuant to § 904.04(2)(a)¹; (2) whether the act satisfies the two relevancy requirements in § 904.01; and, (3) whether the probative value of the evidence is substantially outweighed by the risk or danger of unfair prejudice under § 904.03. The burden of establishing the first two prongs is on the proponent, and then shifts to the opposing party to show the third prong. The purposes

¹ Wis. § 904.04(2)(a) provides that other crimes or acts is not admissible to prove conformity therewith, but permits admission of such acts "when offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

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for which other acts evidence may be admitted “are ‘almost infinite’, with the prohibition against drawing the propensity inference being the main limiting factor.” *State v. Marinez*, 331 Wis.2d 568, 590 (2011) *citing State v. Sullivan*, 216 Wis.2d, 768, 783 (1998).

Wisconsin Statute § 904.04(2)(a) lists several admissible purposes including, “proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” *State v. Marinez*, 331 Wis.2d 568, 584 (2011). For example, evidence may be admissible to provide the “context of the crime and to provide a complete explanation of the case.” *State v. Hunt*, 263 Wis. 2d 1, 35 (2003). In *Hunt*, the court also held, “The other-acts evidence was permissible to show the victims’ state of mind, to corroborate information provided to the police, and to establish the credibility of victims and witnesses in light of their recantations.” *Id.* In *State v. Dorsey*, the Wisconsin Supreme Court recognized that a defendant’s intent and motive to cause bodily harm and to control his victim within the context of an ongoing relationship were acceptable purposes for the admission of other acts evidence. 379 Wis.2d 386, 415 (2018).

“As long as the proponent identifies one acceptable purpose for admission of the evidence that is not related to the forbidden character inference, the first step is satisfied. Consequently, this first step is hardly demanding.” *State v. Payano*, 320 Wis.2d 348 (2009) (internal quotations omitted).

After assessing whether an acceptable purpose for the admission of the evidence has been offered, the court next evaluates the probative value of the evidence. The *Hunt* Court reiterated well-established Wisconsin case law on this issue, “The measure of probative value in assessing relevance is the similarity between the charged offense and the other act. Similarity is demonstrated by showing the nearness of time, place and circumstance between the other act and the alleged crime.” 263 Wis.2d at 38.

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Furthermore, a defendant may not attempt to make certain evidence irrelevant by claiming that he will not contest certain elements of the offense. “If the state must prove an element of a crime, then evidence relevant to that element is admissible, even if a defendant does not dispute the element.” *State v. Veach*, 255 Wis.2d 390, 416 (2002). Thus, in *Veach*, the court did not accept the defendant’s argument that other acts evidence bearing on intent and absence of mistake was irrelevant because the defendant claimed at trial that no physical contact took place whatsoever. *Id.* at 417-23. Therefore, the court held, “as elements of the crime, intent and motive are always facts or propositions of consequence.” *Id.* at 423.

The final consideration in the three-step *Sullivan* analysis is whether the probative value is substantially outweighed by unfair prejudice. At the third step of the analysis, the burden shifts to the defendant. *Dorsey*, 379 Wis.2d at 421. “Because the statute provides for exclusion only if the evidence’s probative value is substantially outweighed by the danger of unfair prejudice, the bias is squarely on the side of admissibility.” *Id.* at 422 (emphasized in the original, internal quotations omitted). “If the probative value is close to or equal to its unfair prejudicial effect, the evidence must be admitted.” *Id.*

1. The Court should admit evidence that the defendant assaulted a female in Kenosha on July 1, 2020.

The defendant is charged with multiple serious felonies, several of which require the State to prove, among other elements, that the defendant intended to inflict a certain type of violence upon other individuals. The prior acts of violence directed against the female subject on July 1, 2020, are offered to show the defendant’s intent to cause bodily harm. On that date, the defendant is seen in video footage near the lake front in Kenosha. The defendant is present with several other people of a similar age. In the footage of this group of teenagers, two teenaged girls are involved in what appears to be a heated argument, while the others of

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the group are standing by. At first it appears the teenagers are going to break apart and go their separate ways, but something then sets off the two female teenagers, and they begin to fight. The defendant then suddenly involves himself in the fight. The defendant grabs one of the two female teenagers (who is wearing a black shirt) from the back as this female subject is grappling with another female. The defendant then begins to punch her in the back repeatedly with a closed fist. As this female teenager is pulled away from the defendant due to her on-going struggle with the other female, the defendant chases after her and begins to punch her in the back again. Several other individuals then rush towards the defendant to break apart the parties, and the video ends shortly thereafter.

The prior act also shows a consistent motive. In both the July 1, 2020 incident and the August 25, 2020 incident, the defendant, an Illinois resident, willingly and intentionally put himself in violent situations in Wisconsin that do not involve him in order to commit further acts of violence. In the July 1, 2020 incident, rather than simply pull apart the parties or contact law enforcement, the defendant begins violently attacking one of the female subjects involved in the fight. In the pending case, the defendant, in violation of a curfew order and law enforcement orders to disperse, illegally armed himself with a dangerous weapon and went to the epicenter of a dangerous riot. There, he shot three people, two of whom died.

The second prong of the 904.04 analysis involves relevancy. Relevant evidence is defined as evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. Wisconsin Statutes Section 904.01. Determining relevance involves assessing the similarity between the charged conduct and the offered evidence. *State v. Gray*, 225 Wis.2d 39, 58 (1999). Similarity is demonstrated by showing the “nearness of time, place, and circumstance” between the other act and the alleged crime. *State v. Scheidell*, 227 Wis.2d 285, 305, 595 N.W.2d 661 (1999).

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The other act occurred on July 1, 2020, less than two months before the charged offense. In light of case law allowing other acts evidence for incidents that were separated by several years, the July event is recent in time for purposes of the *Sullivan* analysis. See e.g., *Plymesser*, 172 Wis.2d 583 (event which occurred 13 years prior admitted as other acts); *State v. Davidson*, 236 Wis.2d 537 (2000) (event which occurred 9 years prior admitted as over acts); and *State v. Opalewski*, 256 Wis.2d 110, 121-23 (Ct. App. 2002) (event which occurred “more than a quarter of a century” earlier admitted as other acts).

As stated above, the defendant, an Illinois resident, came to the downtown area of Kenosha, Wisconsin in both incidents. The defendant then placed himself in violent situations with which he should have had no involvement. After willingly putting himself in these violent conflicts, the defendant responded to them both by perpetrating further acts of violence. The other acts evidence being offered is clearly near in time and place, and is of the same circumstance with the charged offenses.

For the third prong of the 904.04 analysis, the burden shifts to the opponent of the evidence to show that the admission of the evidence is unfairly prejudicial, *Hunt*, 263 Wis. 2d 1 at ¶ 69. The evidence is not unfairly prejudicial. First, a curative instruction can provide the jury the framework on how to evaluate the other acts evidence and apply it fairly and properly. Second, the evidence being sought is of the same nature as the charged conduct. The evidence is not overly prejudicial, and is highly probative. The State therefore respectfully requests the Court admit evidence that the defendant assaulted a female on July 1, 2020.

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2. The Court should admit evidence that the defendant is associated with the “Proud Boys” organization.

On January 13, 2021, the State filed a motion to modify the defendant’s bond in this case based on the fact that he went to a bar in Racine with several members of the “Proud Boys” organization right after Court on January 5, 2021. The State incorporates that motion and its supporting affidavit into this motion. As that motion indicated, the “Proud Boys” are a violently racist organization whose members take pride in assaulting members of racial minorities, particularly Black Lives Matter protesters. Over the past year, members of the “Proud Boys” have violently attacked Black Lives Matter protesters and others in Seattle, Washington D.C., Columbus and Salem, OR, among other locations.²

The State has since learned that the people with the defendant at the bar on January 5, 2021 included the leader of the Wisconsin “Proud Boys” organization and several of its highest-ranking members, who proceeded to serenade the defendant at the bar with their anthem, a song from the Broadway musical “Aladdin”. The defendant posed for pictures with the leaders of the “Proud Boys” organization while flashing their “OK” sign. Obviously, the defendant shares their beliefs and has, in fact, been named an honorary member of the organization.

This evidence is relevant and admissible because it goes to the defendant’s motive and intent for coming to Kenosha on August 25, 2020. The defendant claims that he wanted to protect the Car Source business from rioting and looting that night, but that claim is highly dubious. The defendant had no previous ties to that business. He did not work there or know

² <https://www.seattletimes.com/nation-world/proud-boys-and-black-lives-matter-activists-clashed-in-a-florida-suburb-only-one-side-was-charged/>; <https://www.pbs.org/newshour/politics/proud-boys-leader-arrested-accused-of-burning-church-banner>; <https://www.dispatch.com/videos/news/2021/01/06/fights-statehouse-proud-boys-pro-trump-and-blm-protesters-meet/6569474002/>; <https://www.statesmanjournal.com/story/news/2021/01/01/salem-protests-black-lives-matter-proud-boys-gov-kate-brown-residence-covid-masks/4107728001/>. See also <https://www.kansascity.com/opinion/editorials/article250060744.html>.

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the owner. He was not directly asked by anyone associated with the business to be there.

The defendant did not illegally arm himself with a deadly assault rifle and wade into a chaotic scene simply to protect a random downtown car lot that he had never heard of before. He did it because he wanted to support a cause that he believed in.

The defendant's motive for being there that night is a key part of this case. After the shooting of a black man by a white Kenosha Police Officer on the evening of Sunday, August 23, 2020, many came out to protest what they perceived to be an injustice. Unfortunately, some individuals took this opportunity to riot and destroy many businesses in the downtown area. By the following night, many people had come to Kenosha to counter that protest and what they perceived to be the Black Lives Matter movement behind it. The two opposing sides escalated by Tuesday night, August 25th, when the defendant came to town. He was clearly aligned with the counter-protesters.

The defendant's presence, as well as the presence of other armed individuals, made the potential for violence a certainty. Rather than make things more peaceful, the defendant's presence increased the unrest and chaos. It is important to remember that the only people killed in this entire saga were killed by the defendant, and the only person seriously injured in the protests following the Jacob Blake shooting was shot by him. The defendant deliberately aggravated the situation. It is anticipated that the defendant will attempt to assert the privilege of self-defense at trial. His association with a violent racist group is highly relevant to that assertion. By illegally bringing a deadly weapon to an already volatile situation, the State contends that the defendant forfeited his right to claim self-defense.

Simply put, the defendant was a clear and present threat to the safety of everyone out there that night. He was the aggressor, there with the intent to violently clash with those opposed to his beliefs. After all, that is exactly what happened in the end. It was not the

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defendant who possessed the right to self-defense that evening. It was everyone else, to defend themselves against him.

Much like members of the “Proud Boys” take pride in violence, the defendant is evidently proud that he killed 2 people and seriously wounded a 3rd. He has posed for selfies as if he is a celebrity. His family has sold merchandise with his image on it that celebrates his acts of violence.³ This lack of remorse on the part of the defendant strongly suggests that it was his intent to commit violence on the night of August 25, 2020. The fact that he has since celebrated his notoriety strongly suggests that he set out to achieve the goal of becoming famous. Because the defendant’s association with the “Proud Boys” goes directly to his intent and motive, as well as his claim of self-defense, the Court should admit evidence of this fact at trial.

CONCLUSION

For the foregoing reasons, the State respectfully requests that the Court grant this motion.

³ The State intends to introduce evidence of this fact at trial as it is relevant to the defendant’s state of mind.

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Date Signed: 07/01/21

Electronically Signed By:

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