COURT OF APPEALS
DECISION
DATED AND FILED

October 11, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP1832-CR **Cir. Ct. No. 2002CF394**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KHUE XIONG,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Marathon County: PATRICK M. BRADY, Judge. *Affirmed*.

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Khue Xiong appeals a judgment, entered upon a jury's verdict, convicting him of attempted first-degree intentional homicide and four counts of first-degree recklessly endangering safety by use of a dangerous weapon, with a penalty enhancer on the reckless endangerment counts as criminal

gang crimes contrary to WIS. STAT. §§ 940.01(1)(a), 939.32, 939.63, 941.30(1) and 939.625.[1] Xiong argues the trial court erred by denying his motion to preclude the State from referring to Xiong by his nickname, "Shotgun." Xiong also argues that the evidence at trial was insufficient to support his conviction under the criminal gang enhancer. Xiong additionally contends that the criminal gang enhancer was unconstitutional as applied to him. Alternatively, Xiong urges this court to exercise its discretionary power of reversal pursuant to WIS. STAT. § 752.35 because justice has miscarried and the real controversy has not been fully tried. We reject Xiong's arguments and affirm the judgment.

BACKGROUND

¶2 An Information charged Xiong with three counts of attempted first-degree intentional homicide and four counts of first-degree reckless endangerment by use of a dangerous weapon, with a penalty enhancer on the reckless endangerment counts as criminal gang crimes. The charges arose from an incident at a house party near Wausau, in which members of the Menace of Destruction (MOD), a gang, were involved in a fight with a member of another gang, the Oriental Ruthless Boys (ORB). After one of the MODs allegedly stabbed the ORB member, the MODs and others with them began to leave the party. Witnesses told police that a man later identified as Xiong fired a gun five times into the crowd, hitting three people. Xiong and a member of the Wausau MOD were later apprehended in Minnesota with the gun that was used in the Wausau shooting.

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

¶3 Xiong filed pretrial motions to preclude the State from referring to him by his nicknames, "Danny" or "Shotgun," and also moved to dismiss the criminal gang enhancer attached to the reckless endangerment counts on the ground that there was an insufficient nexus between Xiong and the prior offenses committed by other MOD members. The trial court denied Xiong's pretrial motions. After a jury trial, Xiong was found guilty of one count of attempted first-degree intentional homicide and four counts of first-degree reckless endangerment by use of a dangerous weapon, with the criminal gang enhancer. The jury acquitted Xiong on the remaining two counts of attempted first-degree intentional homicide. The court imposed twenty-five years' imprisonment followed by ten years' extended supervision on Xiong's conviction for attempted first-degree intentional homicide. With respect to the four reckless endangerment convictions, the court imposed five years' imprisonment and five years' extended supervision on each count, all concurrent to each other and to the sentence on the attempted first-degree intentional homicide conviction. This appeal follows.

DISCUSSION

A. Admissibility of the Nickname "Shotgun"

¶4 Xiong argues the trial court erred by denying his motion to preclude the State from referring to Xiong by his nickname, "Shotgun." Xiong claims that the repeated references at trial to Xiong as "Shotgun" were irrelevant and greatly prejudiced his defense. We are unpersuaded.

¶5 Whether to admit evidence is addressed to the trial court's discretion. ***State v. Pharr***, 115 Wis. 2d 334, 342, 340 N.W.2d 498 (1983). An appellate court will sustain an evidentiary ruling if it finds that the circuit court examined the relevant facts, applied a proper standard of law and, using a

demonstrative rational process, reached a conclusion that a reasonable judge would reach. ***Loy v. Bunderson***, 107 Wis. 2d 400, 414-15, 320 N.W.2d 175 (1982). This court has held that WIS. STAT. § 904.04(2) supports the use of an alias at trial if it is related to the facts of the case. ***State v. Bergeron***, 162 Wis. 2d 521, 530, 470 N.W.2d 322 (Ct. App. 1991). Section 904.04(2) permits the admission of evidence relating to acts other than the crime charged when offered for purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

¶6 Rather than preclude references to "Shotgun," the trial court permitted Xiong to explain the nickname and also gave a cautionary jury instruction.[2] As in ***Bergeron***, Xiong's nickname constituted part of the background facts of the case as witnesses first identified the shooter to authorities by his nicknames. Authorities then sought assistance from the Minnesota Gang Strike Force to ascertain the identity of the individual known as "Shotgun" or "Danny." Use of Xiong's nicknames was also relevant to identity and served to avoid jury confusion as the name of one of the witnesses, Kou Xiong, sounds precisely like the defendant's name, Khue Xiong.

¶7 Regardless whether the evidence is admissible under WIS. STAT. § 904.04(2), however, the trial court must still exercise its discretion to determine

[2] The trial court cautioned the jury:

> You have heard evidence that the defendant is referred to by the nickname of "Shotgun." That nickname is not offered to show that the defendant used or was in possession of a shotgun or any kind of firearm on the date in question. You are to ignore any inference to that effect. Any nickname allowed as evidence in this case was for the sole purpose of identification.

whether any resulting prejudice outweighs the probative value. ***Bergeron***, 162 Wis. 2d at 531. Although use of the nickname "Shotgun" at trial may have been prejudicial, it was not unfairly so. The record demonstrates that many of the witnesses had nicknames, and witnesses would inevitably have referred to Xiong by his nickname because that was the only name by which they knew him. Further, defense witnesses explained that "Shotgun" was the name of Xiong's tattoo business, and perhaps the name of a style of tattoos. Finally, the circuit court gave an appropriate cautionary instruction limiting the jury's use of the evidence for the purpose of identification. Such cautionary instructions eliminate or minimize the potential for unfair prejudice, ***State v. Hammer***, 2000 WI 92, ¶29 n.4, 236 Wis. 2d 686, 613 N.W.2d 629, and we presume that the jury followed the cautionary instruction. ***State v. Truax***, 151 Wis. 2d 354, 362 N.W.2d 444 (Ct. App. 1989).

B. Sufficiency of the Evidence

¶8 Xiong argues the evidence at trial was insufficient to support his conviction under the criminal gang enhancer. Whether the evidence supporting a conviction is direct or circumstantial, we utilize the same standard of review regarding its sufficiency. ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). We must uphold Xiong's conviction "unless the evidence, viewed most favorably to the State and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***Id.*** If there is a possibility that the jury "could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt," we must uphold the verdict even if we believe that the jury "should not have found guilt based on the evidence before it." ***Id.*** at 507. It is the jury's function to decide the credibility of witnesses

and reconcile any inconsistencies in the testimony. ***State v. Toy***, 125 Wis. 2d 216, 222, 371 N.W.2d 386 (Ct. App. 1985). Thus, if more than one inference can be drawn from the evidence, this court will follow the inference that supports the jury's finding "unless the evidence on which that inference is based is incredible as a matter of law." ***Poellinger***, 153 Wis. 2d at 506-07.

¶9 The criminal gang enhancer provides:

> If a person is convicted of a crime under chs. 939 to 948 or 961 committed for the benefit of, at the direction of or in association with any criminal gang, with the specific intent to promote, further or assist in any criminal conduct by criminal gang members, the penalties for the underlying crime are increased as provided in par. (b).

WIS. STAT. § 939.625(1)(a) (2001-02). The State therefore had to prove that: (1) Xiong acted with the specific intent to promote, further or assist criminal conduct by criminal gang members; (2) the crime was committed for the benefit of, or at the direction of, or in association with the criminal gang; and (3) MOD was a criminal gang.

¶10 Xiong claims the State failed to prove that one of MOD's primary activities was engaging in criminal activities and that Xiong "would have committed the crime with the specific intent to promote criminal conduct by Wausau MOD members." We disagree.

1. Evidence to establish MOD was a criminal gang

¶11 By arguing the State failed to prove that one of MOD's primary activities was engaging in criminal activities, Xiong is essentially challenging the evidence that MOD is a criminal gang. WISCONSIN STAT. § 939.22(9) defines "criminal gang" as:

> [A]n ongoing organization, association or group of 3 or more persons, whether formal or informal, that has as one of its primary activities the commission of one or more of the criminal acts specified in [WIS. STAT. §] 939.22(21)(a) to (s); that has a common name or a common identifying sign or symbol; and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity.

To prove a pattern of criminal gang activity, the State had to prove "the commission of … two or more" specified crimes within three years of one another, either on separate occasions or by two or more persons. WIS. STAT. § 939.22(21).

¶12 During his trial testimony, Ka Ying Vue, a self-admitted MOD member, identified various fellow MOD members, including Ki Vang, Marcus Okutsu, Kou Xiong ("Shortie"), Lue Yang ("LoDas"), Lou Vang, Ying Vang, Tou Bee Vang, Khue Xiong ("Shotgun" or "Danny"), Tai Yang ("Slick") and Josh Vang. Although Ki Vang testified that he and others identified by Vue were not MOD members, Vang indicated that MOD was a criminal gang. Further, a gang expert testified that one of MOD's primary objectives is to commit crime. Finally, the jury heard evidence regarding specific instances of MOD criminal activity, including two batteries and two criminal damage to property crimes, as well as the stabbing, criminal property damage to automobiles and shootings that occurred at the party forming the basis for the present claims. From this evidence, a reasonable jury could determine that engaging in criminal activity was one of MOD's primary objectives.

2. Evidence of Xiong's specific intent

¶13 Xiong also argues the State failed to prove his specific intent to promote criminal conduct by Wausau MOD members. The State however, had only to prove that Xiong shot into the crowd "for the benefit of, at the direction of

or in association with any criminal gang, with the specific intent to promote, further or assist in any criminal conduct by criminal gang members." At trial, witnesses from the party testified that around the same time a fight broke out between MOD members and a single member of ORB, Xiong walked through the crowd asking "Who's ORB, who's ORB," adding that "he had a bullet for anybody who was ORB." Shortly thereafter, Xiong fired a gun at Francois Yang and four others, hitting Yang in the abdomen and two others in the foot and leg.

¶14 From this evidence, a reasonable jury could find that Xiong's words and conduct in conjunction with the MODs' battering and stabbing someone they believed was a rival gang member were sufficient to prove Xiong's intent to promote or assist the gang's criminal conduct. To the extent Xiong contends the State failed to prove that different MOD "chapters" were affiliated, the State had only to prove that Xiong fired a gun into the crowd at the party in furtherance of MOD criminal activity. We conclude the evidence is sufficient to support application of the criminal gang enhancer.

C. Constitutionality of Criminal Gang Enhancer

¶15 Xiong contends that the criminal gang enhancer was unconstitutional as applied to him. "A party challenging the constitutionality of a statute as applied must demonstrate that it is unconstitutional beyond a reasonable doubt." ***State v. Joseph E. G.***, 2001 WI App 29, ¶5, 240 Wis. 2d 481, 623 N.W.2d 137. Whether a statute is unconstitutional is a matter of law, determined without deference to the trial court. ***State v. Johnson***, 2001 WI 52, ¶10, 243 Wis. 2d 365, 627 N.W.2d 455.

¶16 Here, Xiong argues application of the criminal gang enhancer was unconstitutional because the State failed to establish a nexus between him and the predicate crimes that were used to prove the existence of a criminal gang. Xiong

contends that if no nexus were required, an MOD member could be liable for the conduct of MODs in a different jurisdiction if the MOD had even the most innocent association with the offending MODs. This "guilt by innocent association" argument fails, however, because the criminal gang enhancer does not criminalize innocent conduct such as "hanging out with" or "visiting buddies," nor does it make a gang member liable for the actions of other gang members simply because the gang member innocently associates with them. The criminal gang enhancer statute, by its plain language, does not reach innocent activity but, rather, applies only when a person commits a specified crime for the benefit of the gang and with the intent to promote or further the gang's criminal conduct. *See* WIS. STAT. § 939.625.

¶17 Here, Xiong's conduct was patently not innocent as he shot into a crowd to benefit the MODs who had been involved in a fight with a rival gang member. To the extent Xiong argues that evidence of the predicate crimes should not have been admitted absent a nexus, this argument reduces to an assertion that the State should not have been permitted to prove an element of the criminal gang enhancer – namely, that MOD is a criminal gang. Xiong was not held liable for the predicate crimes used to establish the existence of a criminal gang. Rather, he was held responsible for his own conduct, done to assist or promote the MODs' criminal activity at the party. Xiong's claim that the criminal gang enhancer was unconstitutional as applied to him therefore fails.

D. New Trial in the Interest of Justice

¶18 Alternatively, Xiong seeks a new trial under WIS. STAT. § 752.35, which permits us to grant relief if we are convinced "that the real controversy has not been fully tried, or that it is probable that justice has for any reason

miscarried." In order to establish that the real controversy has not been fully tried, Xiong must convince us "that the jury was precluded from considering 'important testimony that bore on an important issue' or that certain evidence that was improperly received 'clouded a crucial issue' in the case." ***State v. Darcy N.K.***, 218 Wis. 2d 640, 667, 581 N.W.2d 567 (Ct. App. 1998) (quoting ***State v. Hicks***, 202 Wis. 2d 150, 160, 549 N.W.2d 435 (1996)). To establish a miscarriage of justice, Xiong "must convince us 'there is a substantial degree of probability that a new trial would produce a different result.'" ***Darcy***, 218 Wis. 2d at 667 (quoting ***State v. Caban***, 210 Wis. 2d 597, 611, 563 N.W.2d 501 (1997)). An appellate court will exercise its discretion to grant a new trial in the interest of justice "only in exceptional cases." ***State v. Cuyler***, 110 Wis. 2d 133, 141, 327 N.W.2d 662 (1983).

¶19 Xiong argues that his trial was infected by his MOD affiliation. Specifically, Xiong contends the real controversy was not fully tried because the trial focused on the danger of the MOD gang rather than Xiong as an individual. We are not persuaded. Xiong's MOD affiliation was necessarily part of the trial because it explained why he committed the crimes. In fact, Xiong did not dispute that he was an MOD member or that the shooting was MOD-related. Rather, he claimed that another MOD member was the shooter. Xiong therefore mischaracterizes the record when he claims the trial was primarily about MOD gangs as a "menace to society." Although the State introduced evidence of predicate crimes to establish that MOD was a criminal gang, the preponderance of the testimony was about the incidents surrounding the shooting and Xiong's role in it. We are satisfied that the real controversy has been fully tried, and that there has been no miscarriage of justice. Therefore, we conclude there is no reason to

exercise our discretionary authority under WIS. STAT. § 752.35 to reverse the judgment.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.