

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 25, 2011

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2010AP56-CR

Cir. Ct. No. 2007CF339

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DEMARIO EARL BARBER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Racine County:
STEPHEN A SIMANEK, Judge. *Affirmed.*

Before Brown, C.J., Neubauer, P.J., and Anderson, J.

¶1 PER CURIAM. Demario Earl Barber has appealed from a judgment convicting him after a jury trial of attempted first-degree intentional homicide in

violation of WIS. STAT. §§ 939.32(1)(a) and 940.01(1)(a) (2009-10).¹ The sole issue raised by him on appeal is whether the trial court erroneously exercised its discretion at trial by admitting evidence regarding the gang affiliation of Barber and various witnesses. Because the trial court properly exercised its discretion in admitting the evidence, we affirm Barber's judgment of conviction.

¶2 Barber's conviction arises from a shooting outside a Racine bowling alley on the night of March 3, 2007. Testimony was presented at trial indicating that Barber had gone to the bowling alley with Steven Miller, Jeremy Branch, and Aubrey Hale. Testimony further indicated that as Barber, Miller, and Hale left the bowling alley at approximately 11:00 p.m., they encountered Mark Geater, Rashad Lewis, and Jonathan Sparks in the parking lot near the door. Evidence indicated that Lewis punched Barber, and that Barber pulled out a gun and shot Geater four times, causing life-threatening injuries.

¶3 Prior to trial, Barber filed a motion in limine asking that the prosecutor be prohibited from mentioning his alleged gang affiliation at trial. The trial court denied the motion, determining that the evidence was relevant to motive.

¶4 At trial, Geater and Miller both testified that Barber was the person who shot Geater.² Miller also testified that he, Barber, Branch, and Hale were

¹ All references to the Wisconsin Statutes are to the 2009-10 version.

² Evidence that Barber shot Geater was presented through Geater's testimony at trial, and through evidence of a statement given by him to Yde after the shooting. While the evidence also indicated that Geater changed his statement at one point to state that he did not know who shot him, he testified at trial that he did this only because his family was threatened, and it was not true that he did not know who shot him.

members of the Gangster Disciples,³ and that Geater was a member of the Vice Lords. Miller testified that he “guess[ed]” that the Gangster Disciples and Vice Lords were enemies. In a statement to Investigator Todd Yde, Miller indicated that Lewis and Sparks were also Vice Lords, and described them all as “snakes.” In his statement, he indicated that Barber, Geater, and Lewis had had conflicts in the past. According to Yde, Miller indicated that he was cooperating in the investigation because he was tired of the gang lifestyle that he was leading.

¶5 Miller’s testimony regarding Barber’s gang affiliation was corroborated by a statement made to Yde by Mario Johnson, a friend of Barber’s. At trial, Johnson admitted having told Yde that Barber told him that he shot Geater.⁴ Although Johnson denied at trial that he was affiliated with any gang and denied having told Yde that Barber was a member of the 6th Ward Gangster Disciples, Yde testified that in his prior statement, Johnson had discussed gang affiliations and told the investigating officers that Barber hung out with three or four people who were all 6th Ward Gangster Disciples.

¶6 The State also presented testimony from Erica Pittman, who was in the parking lot of the bowling alley at the time of the shooting. At trial, Pittman testified that she did not recall having told Yde and another officer during an interview conducted a couple of hours after the shooting that she saw Barber shoot Geater. She testified that she did not recall Barber shooting Geater, nor did she recall picking Barber’s photo out of a photo array and identifying him as the shooter. However, the officer who conducted the photo array testified that Pittman

³ Miller identified Branch, Geater, and Rashad Lewis by nicknames.

⁴ At trial, Johnson claimed that he was lying when he gave this statement to Yde.

identified Barber as the shooter. In addition, the jury heard a recording of Pittman's interview with Yde conducted shortly after the shooting, in which she identified Barber as holding his hand out and shooting Geater. In her statement, Pittman indicated that she did not know why it happened, but knew Barber and Geater did not get along, and referred to "north side and south side stuff." Pittman also expressed fear that she was endangering her safety by providing information. Yde indicated that in a subsequent statement, Pittman also told him that she had been pressured and asked not to testify by Barber's sister and girlfriend.

¶7 Rashad Lewis was called as a witness for the defense. He testified that he knew Barber, but denied engaging in an altercation with him at the bowling alley on March 3, 2007. He testified that the shooter was masked, and that he did not know who the shooter was. He denied that Barber was a member of the Gangster Disciples, and denied that he was a member of the Vice Lords. However, he admitted that he hung out with Vice Lords, and admitted that he disliked Barber and had had many confrontations with him in the past.

¶8 In his opening and closing arguments, the prosecutor referred to the evidence regarding gang affiliation. He contended that the altercation and shooting arose from gang rivalry.

¶9 On appeal, Barber argues that the trial court erroneously exercised its discretion by admitting the evidence regarding gang affiliation. He contends that the evidence was "other acts" evidence, and was improperly admitted under WIS. STAT. § 904.04(2)(a). He also contends that the evidence was irrelevant because there was no evidence that the alleged respective gang affiliations of Barber and Geater motivated this crime or that gang membership played any part

in the criminal activity. He contends that the evidence led to a confusion of the issues and was prejudicial.

¶10 We reject all of Barber's arguments. The evidence regarding gang affiliation was not evaluated by the trial court under the analytical framework set forth in *State v. Sullivan*, 216 Wis. 2d 768, 771-73, 576 N.W.2d 30 (1998), nor did it have to be because gang affiliation was not other acts evidence within the meaning of WIS. STAT. § 904.04(2)(a).

¶11 Subject to certain exceptions set forth in WIS. STAT. § 904.04(2)(b), evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith.⁵ Evidence of gang affiliation was not evidence of other crimes, wrongs, or acts. It was not character evidence offered to prove that Barber or any other witness acted in conformity with a character trait demonstrated by the evidence. WISCONSIN STAT. § 904.04(2)(a) was therefore inapplicable to the determination of whether the evidence was admissible. Instead, as recognized by the trial court, the issue was whether the evidence was relevant and admissible under WIS. STAT. § 904.01 and § 904.02.

¶12 The admissibility of evidence is determined by the trial court subject to the limits of relevancy and the adequacy of proof. *Michael R.B. v. State*, 175 Wis. 2d 713, 723, 499 N.W.2d 641 (1993). Trial courts exercise broad discretion with respect to the admissibility of evidence as long as the evidence tends to prove

⁵ WISCONSIN STAT. § 904.04(2)(a) does not exclude such evidence when offered for one of the other purposes specified therein, such as motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

a material fact. *Id.* Material facts are those of consequence to the merits of the litigation. *Id.* at 724. Relevancy depends upon whether the evidence tends to make the existence of a material fact more probable or less probable than it would be without the evidence. *Id.* To be relevant, evidence need not prove the matter by itself. *State v. Brewer*, 195 Wis. 2d 295, 309, 536 N.W.2d 406 (Ct. App. 1995). It need only be a link in the chain of proof. *Id.*

¶13 This court will not reverse the trial court’s decision to admit evidence if there is a reasonable basis for the decision and it was made in accordance with accepted legal standards and the facts of record. *Id.* at 305. As determined by the trial court, evidence that Barber and Geater belonged to rival gangs was relevant on the issue of whether Barber had a motive to shoot Geater. Barber was charged with attempted first-degree homicide. At trial, the State had the burden of proving that Barber intended to kill Geater. WIS JI—CRIMINAL 1010. Although not an element of the crime, evidence regarding motive is admissible when it meets the same relevancy standards as any other evidence. *State v. Brecht*, 143 Wis. 2d 297, 320, 421 N.W.2d 96 (1988). Motive is “the reason which leads the mind to desire the result of an act.” *State v. Fishnick*, 127 Wis. 2d 247, 260, 378 N.W.2d 272 (1985). Matters going to motive bear upon considerations of intent. *State v. Johnson*, 121 Wis. 2d 237, 253, 358 N.W.2d 824 (Ct. App. 1984). A defendant’s intent may be inferred from his motive for committing the crime. *State v. Hoffman*, 106 Wis. 2d 185, 200-01, 316 N.W.2d 143 (Ct.App. 1982).

¶14 The testimony of Miller was sufficient to permit the jury to find that Barber and Geater were members of gangs that were adversaries and enemies, and that each was in the company of fellow gang members when the shooting occurred. Miller’s testimony was corroborated by Yde’s testimony regarding

Johnson’s prior statement indicating that Barber hung out with Gangster Disciples, and by Lewis’ admission at trial that he “usually kick[s] it” with Vice Lords and “smoke[s] weed” with them. As recognized by the trial court, the evidence that Barber and Geater were affiliated with rival gangs reasonably permitted the conclusion that Barber had a motive to shoot Geater, and made it more probable that Barber intentionally shot Geater based on gang-related animosity when an altercation arose. By demonstrating a gang-related motive, the gang affiliation evidence permitted a reasonable inference that Barber intended to shoot and kill Geater.⁶

¶15 As discussed by Barber, even relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice or the danger that it will mislead the jury. *State v. Burton*, 2007 WI App 237, ¶13, 306 Wis. 2d 403, 743 N.W.2d 152; WIS. STAT. § 904.03. Here, the trial court knew of Barber’s objection that the evidence was unfairly prejudicial. Because it implicitly determined that the probative value of the evidence was not outweighed by unfair prejudice, and because the record supports its ruling, no basis exists to

⁶ Because the trial court properly admitted the evidence of gang affiliation to show motive and intent, we need not address Barber’s argument that the evidence was not relevant to show bias under *State v. Long*, 2002 WI App 114, ¶17, 255 Wis. 2d 729, 647 N.W.2d 884. We also note that while the prosecutor stated that the evidence was admissible to prove both motive and bias, his primary argument for admissibility related to motive and intent, and the trial court relied on motive in admitting the evidence.

disturb its decision admitting the evidence.⁷ See *Shawn B. N. v. State*, 173 Wis. 2d 343, 367, 497 N.W.2d 141 (Ct. App. 1992).

By the Court.—Judgment affirmed.

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

⁷ In reaching this conclusion, we note that the evidence regarding gang affiliation was limited to testimony and statements by witnesses as to whether they did or did not belong to or affiliate with members of the Gangster Disciples and Vice Lords, and whether those gangs were rivals or enemies. We also note that the trial court limited the testimony about gang affiliations when it sustained Barber's objection to testimony from Yde about gang culture, determining that such testimony would be cumulative and a waste of time in light of the evidence regarding gang affiliation that had already been presented. This case is thus distinguishable from *State v. Burton*, 2007 WI App 237, ¶¶16-19, 306 Wis. 2d 403, 743 N.W.2d 152, where an investigator was improperly permitted to testify as an expert about gang culture and its impact on behavior, even though there was no evidence that the defendant or other witnesses to whom the investigator referred were gang members.

