COURT OF APPEALS DECISION DATED AND RELEASED

November 7, 1995

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

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-0257-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TIMOTHY T. MORGAN,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: PATRICIA D. McMAHON, Judge. *Affirmed*.

Before Wedemeyer, P.J., Sullivan and Schudson, JJ.

PER CURIAM. Timothy T. Morgan appeals from the judgment of conviction, following a jury trial, for first-degree intentional homicide while armed. He also appeals from the trial court order denying his motion for postconviction relief. He argues that the trial court erred by: (1) allowing reference to his gang affiliation; (2) allowing testimony that a State's witness was brought to trial pursuant to a body attachment; and (3) excluding a psychologist's testimony that Morgan had a non-violent character. We affirm.

Morgan, age sixteen at the time of the crime, killed fifteen-year-old Jeffrey Griffin in what appeared to be a senseless, gang-related retaliation. Jerald Jenkins, a State's witness, testified that he and Morgan were members of the Vice Lords. He testified that Griffin belonged to a gang, the "McKinley Street Players," and that a couple of weeks before the shooting, there had been a confrontation between a group of youths that included Griffin and a group of youths that included Morgan. Jenkins testified that the confrontation so angered Morgan that he (Morgan) "said he was going to pop them before they pop him." Jenkins stated that he saw Morgan shoot Griffin once, causing him to fall, and two more times as Griffin lay on the ground.

Morgan did not deny shooting Griffin, but maintained that he acted in self-defense when he panicked in response to Griffin making a gesture toward his (Griffin's) pocket. This theory of defense, however, was offered only in defense counsel's opening statement. Counsel stated:

> [I]t is very likely that [Morgan] will take the stand and tell you ... that when he saw Jeffrey Griffin's hands coming out of his pocket, he realized that this is the real thing. There is no place to go anymore. There is no place to hide, and he pulled out his gun and he started firing. And when the gun ran out of bullets, he ran away because he was scared to death.

Evidence supporting this theory, however, was not introduced. Morgan never testified, and none of the defense's five witnesses saw the shooting.

Morgan first argues that the trial court erred in allowing witnesses to refer to gang affiliations. Jenkins testified that both he and Morgan were associated with the Vice Lords. Detective Olson testified that Jenkins told him that Morgan was "a Vice Lord from the Cabrini Green housing projects in Chicago." Morgan did not object to Jenkins's testimony. Although defense counsel did object to the question of Olson regarding whether Jenkins knew Morgan was a gang member, counsel indicated that he would "state my objection on the sidebar." The sidebar then was conducted but not reported, and defense counsel made no further record of the basis for his objection. We

conclude that Morgan waived any challenge to testimony about gang affiliations.

Section 901.03(1)(a), STATS., in relevant part provides that "[e]rror may not be predicated upon a ruling which admits ... evidence unless ... a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context." Morgan failed to object to Jenkins's gang reference. Morgan also failed to make an adequate record of the basis for his objection to Olson's testimony. *See **State v. Peters***, 166 Wis.2d 168, 174, 479 N.W.2d 198, 200 (Ct. App. 1991) ("a defendant must apprise the trial court of the specific grounds upon which the objection is based" to preserve the matter for appellate review). Here, the specific ground is "not apparent from the context," *see* § 901.03(1)(a), STATS., because this gang reference was one of many throughout the trial, some elicited by the defense, which apparently related to a clearly relevant aspect of the trial—the antagonism between Morgan and Griffin. As the trial court noted in its decision denying postconviction relief, "[t]he defense relied on the existence of gangs, or rival groups, in its effort to establish that the defendant felt fear for his own safety."

Morgan next argues that the trial court erred in allowing Milwaukee Police Detective Gary Temp to testify that William Long had to be brought to the trial pursuant to a body attachment. Long testified that he was the boyfriend of Morgan's aunt and that, shortly after midnight on the night of the shooting, Morgan appeared at his apartment in Madison, Wisconsin. Long testified about certain admissions that Morgan made to him involving how he obtained the gun and other circumstances of the shooting. Later in the trial, Detective Temp testified that he met with Madison police to secure the appearance of Long who was in custody on a body attachment warrant for failing to respond to a subpoena. Again, however, Morgan did not object. Thus, he waived this issue as well.

Finally, Morgan argues that the trial court erred in not allowing Dr. Itzhak Matusiak, a psychologist who had examined Morgan for purposes of the juvenile waiver hearing, to testify that Morgan had a non-violent character. At the waiver hearing, Dr. Matusiak testified regarding Morgan's "non-assaultiveness and non-aggressiveness." Morgan presented Dr. Matusiak's waiver hearing testimony as an offer of proof to the trial court.

The State concedes that the trial court erroneously concluded that Matusiak's opinion lacked sufficient foundation. As the State acknowledges, the supreme court has concluded that "[e]vidence of a defendant's character for nonviolence has been recognized as a pertinent character trait in a prosecution for first degree murder." ***State v. Brecht***, 143 Wis.2d 297, 322, 421 N.W.2d 96, 106 (1988). The State argues, however, that even if Dr. Matusiak's testimony would have qualified as an admissible opinion of Morgan's character under § 904.05(1), STATS., it was properly excluded under § 904.03, STATS., because it "was only marginally relevant to defendant's claim of self-defense and was cumulative of other opinion testimony that defendant has a character for nonviolence." Alternatively, the State argues that the exclusion of Dr. Matusiak's testimony was harmless error.

We conclude that any error in the exclusion of Dr. Matusiak's testimony was harmless because there is no reasonable possibility that the admission of Dr. Matusiak's testimony would have altered the jury's verdict. *See* ***State v. Dyess***, 124 Wis.2d 525, 543, 370 N.W.2d 222, 231-232 (1985). As the State convincingly argues, this is clear for several reasons.

First, Dr. Matusiak's testimony regarding Morgan's non-violent character would have been substantially compromised by additional testimony he offered at the waiver hearing. Perhaps most significantly, Dr. Matusiak testified that Morgan "does have some problems with impaired perceptions," "has some difficulties modulating his emotions," and "forming peer relationships," has "a negative and oppositional orientation," "may not be willing to tolerate some of the refined compromises involved in the course of social contacts,... [a]nd he may occasionally react with anger and with oppositional realism especially when he feels wronged." Further, Dr. Matusiak conceded in his testimony at the waiver hearing that his "diagnostic statement ... doesn't tell us about what that person really is like and in the real world."

Second, other defense witnesses testified that Morgan had a non-violent character.

Third, the defense offered no evidence to support Morgan's opening statement claim of self-defense. *See* ***State v. Camacho***, 176 Wis.2d 860, 872, 501 N.W.2d 380, 384 (1993) (defendant must meet "initial requirement" "to

show that he reasonably believed that he was preventing or terminating an unlawful interference with his person" to support a self-defense claim).

Finally, the State's case was overwhelming. It included evidence that Morgan intended to "pop" those in a group of youths including Griffin, borrowed a gun before the shooting, crossed the street to confront Griffin, and shot him multiple times, even after Griffin fell to the ground.

In light of the foregoing, there is no reasonable possibility that admission of Dr. Matusiak's testimony would have altered the jury's verdict and, therefore, any error in its exclusion was harmless.

By the Court.—Judgment and order affirmed.

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