

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

March 13, 1996

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

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No. 95-0989-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

SAMMY R. RAMIREZ,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Racine County:
NANCY E. WHEELER, Judge. *Affirmed.*

Before Anderson, P.J., Nettesheim and Snyder, JJ.

PER CURIAM. Sammy R. Ramirez appeals from a judgment convicting him as a party to the crime of first-degree reckless homicide while armed, aggravated battery while armed and six counts of recklessly endangering safety while armed. He argues that other acts evidence was improperly admitted and that at sentencing the court erroneously exercised its discretion by relying on an unsupported belief that he was involved in other criminal activity. We conclude that the trial court properly exercised its discretion and affirm the judgment.

On November 7, 1993, Ramirez and some other people accompanied Ramiro Villarreal to a house where Villarreal wanted to fight Jamie Garcia. While the group was standing in front of the house, either Villarreal or Ramirez fired a gun at the window of the house. Bullets struck two persons inside the house, killing one and injuring the other. Six people were in the house at the time and all were at risk of being struck by the bullets.

Ramirez and Villarreal were tried together. They were shown to be members of a gang, with Ramirez being the leader. Garcia was a member of a rival gang. Ramirez testified that as he, Villarreal and others were leaving a party to go to the house where Garcia was, he retrieved a gun from one of his companions, returned it to the owner, and told the owner to put it away. He further indicated that he tried to talk Villarreal out of his plan to fight with Garcia. Having failed to convince Villarreal, Ramirez turned to leave the front of the house. He then heard gunfire. He saw Villarreal with his arm out as if he had just fired a gun.

Evidence was admitted that Villarreal had a motive to fight Garcia and that earlier in the evening Garcia and Villarreal had a confrontational exchange of gang signs. There was evidence that approximately one month before the shooting, Villarreal had broken a bottle over Garcia's head while the two were at a party. The prosecution solicited evidence that possibly Ramirez but certainly members of Ramirez's gang were at the party when Villarreal attacked Garcia. There was also evidence that in July 1993, Ramirez and fellow gang members were at a party and beat up a person.¹ At that same party, Ramirez had an argument with DeWitt Pratt. Pratt was shot to death later at the party.

Ramirez argues that the evidence that he was present when these unrelated crimes occurred was improper other acts evidence.² Other acts

¹ Ramirez admitted to "kick[ing] ... [s]ome guy who was on the ground" at the party.

² We question whether the mere presence at a party where others engaged in misconduct constitutes "other crimes, wrongs, or acts" within § 904.04(2), STATS. Here, however, there was acknowledgement that Ramirez participated in one of the fights, and it was implied that by his gang leadership Ramirez's presence when the misconduct occurred was influential. Under these circumstances, the "other acts" analysis is appropriate.

evidence must be subjected to a two-step analysis before being admitted. First, the evidence must be relevant to one of the exceptions listed in § 904.04(2), STATS. Second, the evidence must be shown to be more probative than prejudicial. *State v. Mink*, 146 Wis.2d 1, 13, 429 N.W.2d 99, 103 (Ct. App. 1988). Implicit in this analysis is the requirement that the evidence is relevant to an issue in the case. *State v. C.V.C.*, 153 Wis.2d 145, 162, 450 N.W.2d 463, 469 (Ct. App. 1989). Our review of this issue is governed by the misuse of discretion standard, and the trial court's decision to admit the other acts evidence will be upheld if it is in accordance with legal standards and facts of record, if the court undertook a reasonable inquiry and examination of the underlying facts, and if there exists a reasonable basis for the determination. *State v. Jones*, 151 Wis.2d 488, 492-93, 444 N.W.2d 760, 762 (Ct. App. 1989).

We conclude that the trial court properly exercised its discretion when it allowed evidence of Ramirez's presence and assistance at prior confrontations involving his fellow gang members. The evidence met the intent and motive exception in § 904.04(2), STATS.³ The evidence established Ramirez's intent to do bodily harm to others in furtherance of gang activity, whether as a direct actor or as an aider and abettor. It demonstrated Ramirez's intent to support fellow gang members in physical confrontations and even his willingness to lead such confrontations. It not only supports the theory that Ramirez shot into the house but also that he was ready and willing to render aid to Villarreal as Villarreal approached the house with criminal conduct in mind. Moreover, the evidence rebuts Ramirez's theory of defense that he was merely an innocent bystander at the shooting and that he attempted to defuse Villarreal's desire for a confrontation. The evidence established that Ramirez does not avert these confrontations but intends to assert his gang's power by meeting threat with threat, force with force.

We turn to the trial court's weighing of the danger of unfair prejudice and the probative value of the other acts evidence. We agree with the trial court's assessment that the evidence was highly probative given the similarities between the incidents and the crime here. Both involved Ramirez's

³ The other acts evidence was part of the State's theory that Ramirez, as the gang leader, empowered others to act to further gang objectives. The theory blends intent and motive. The exceptions in § 904.04(2), STATS., are not precise categorical limitations but may "slide into each other." *State v. Tarrell*, 74 Wis.2d 647, 662, 247 N.W.2d 696, 704 (1976) (Abrahamson, J., dissenting).

participation with gang members in assaulting or attempting to assault gang rivals, both occurred as members congregated at a house for a party, and both escalated to gunfire. The other acts evidence was also very probative in refuting Ramirez's theory of defense. It was not particularly inflammatory evidence but merely demonstrative of the attributes of gang affiliation. The evidence was limited to a single witness's account and there was no intimation that Ramirez was directly responsible for the shooting death at the prior party. The evidence was not unfairly prejudicial because it did not appeal to jury sympathy, arouse the jury's sense of horror or promote its desire to punish. See *State v. Bedker*, 149 Wis.2d 257, 266-67, 440 N.W.2d 802, 805 (Ct. App. 1989). The trial court properly exercised its discretion in admitting the evidence.

Ramirez challenges his sentence arguing that the sentencing court relied on an unproven assumption that he was involved in ongoing criminal activity as a gang member.⁴ The State argues that Ramirez waived the potential error by not making an objection at the time of sentencing. Although a contemporaneous objection is necessary to preserve a claim that at sentencing the prosecution breached the plea agreement, we do not impose that requirement during the sentencing court's remarks.⁵ However, for appellate review it is necessary that the alleged error be raised before the trial court by a postconviction motion. *State v. Hayes*, 167 Wis.2d 423, 425-26, 481 N.W.2d 699, 700 (Ct. App. 1992). The issue raised for the first time on appeal is not properly before this court.

Even if the issue was properly preserved for review, we would reject Ramirez's contention that the sentencing court improperly relied on

⁴ Ramirez cites the court's comment, "You have shown us that despite leading a gang, you were successful in avoiding contact with the criminal justice system, but as we know gang activity and the finances to support gang members result from criminal activity."

⁵ The State cites *State v. Marhal*, 172 Wis.2d 491, 505, 493 N.W.2d 758, 765 (Ct. App. 1992), as requiring a contemporaneous objection during sentencing. However, in *Marhal* the required objection to preserve the alleged error for appellate review would have been made prior to sentencing in that the defendant sought the judge's recusal. *Marhal* does not apply to a potential objection to the court's sentencing remarks once sentencing is underway. Requiring a contemporaneous objection during the court's remarks puts trial counsel in a quandary between preserving error or interrupting the court in a manner that may be awkward and potentially interpreted as disrespectful.

unproven criminal conduct. The court's comment was not inaccurate as to Ramirez's gang involvement as the gang leader and it correctly noted that Ramirez had no prior criminal record. The comment did not amount to a finding that Ramirez had a prior record or that he needed punishment for escaping prosecution on other crimes. It was merely a recognition of Ramirez's history of undesirable behavior patterns, a proper sentencing consideration. *See State v. Thompson*, 172 Wis.2d 257, 264-65, 493 N.W.2d 729, 732 (Ct. App. 1992). The court's entire sentencing rationale reflects consideration of appropriate factors and the facts of record.

By the Court. – Judgment affirmed.

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