

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 21, 2003

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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

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. 02-3075-CR
STATE OF WISCONSIN**

Cir. Ct. No. 00-CF-164

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

LENG XIONG,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Outagamie County: DEE R. DYER, Judge. *Affirmed.*

Before Dykman, Vergeront and Lundsten, JJ.

¶1 PER CURIAM. Leng Xiong appeals a judgment convicting him of armed burglary and an order denying his motion for sentence modification. He

argues that the circuit court misused its discretion in sentencing him to an indeterminate term of thirty years of imprisonment.¹ We affirm.

¶2 Xiong’s challenge to the sentence focuses on three points. He contends that his sentence is too harsh, that the circuit court relied on an improper factor in sentencing him, and that he should not have received a longer sentence than his co-defendants. We reject these arguments.

¶3 Xiong was convicted of armed burglary for stealing guns from a store with fellow members of a gang called the Oriental Ruthless Boys (ORB). The gang stole the guns to use in its activities and to sell them. One of the guns was subsequently used in a drive-by shooting. Another of the guns was used in a suicide. Xiong was identified by his co-defendants and other citizen witnesses as the gang leader. On these facts, the circuit court was clearly acting within its discretion in imposing a harsh sentence based on the danger Xiong’s activities posed to the public and the severity of the crime. *See State v. Hilleshiem*, 172 Wis. 2d 1, 23, 492 N.W.2d 381 (Ct. App. 1992) (we will affirm a sentencing decision “if there is a reasonable basis for the court’s determination”). As for Xiong’s claim that the circuit court relied on an improper factor in sentencing him—he argues the circuit court believed he “orchestrated” the crime—the circuit court said only that Xiong was the leader of the gang and that the crime was committed to procure guns for gang-related activities. The record supports these assertions. And, to the extent that the circuit court implied he ultimately carried more responsibility as the leader, that inference is reasonable.

¹ This crime occurred on or about January 14, 1999, before the truth-in-sentencing law took effect.

¶4 Finally, we reject Xiong’s claim that he should not have received a sentence that was harsher than the sentences of his co-defendants. Comparison to only one co-defendant is appropriate because the others were charged with lesser crimes than Xiong. The co-defendant who was also charged with a Class B felony, as Xiong was, received a twenty-year sentence. Because Xiong was the leader of this gang and the purpose of this crime was to procure guns for gang-related activities and sales, a harsher sentence for Xiong was not improper. *See State v. Toliver*, 187 Wis. 2d 346, 362, 523 N.W.2d 113 (Ct. App. 1994) (“A mere disparity between the sentences of co-defendants is not improper if the individual sentences are based upon individual culpability and the need for rehabilitation.”).

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2001-02).

