

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 25, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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 § 808.10 and RULE 809.62, STATS.

No. 97-0023-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANOU LO,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for La Crosse County: RAMONA A. GONZALEZ, Judge. *Affirmed.*

Before Eich, C.J., Dykman, P.J., and Deininger, J.

PER CURIAM. Anou Lo appeals a judgment convicting him after a jury trial of attempted first-degree intentional homicide while armed and first-degree reckless endangerment while armed, and an order denying his postconviction motions for a new trial. The issues on appeal are whether defense counsel was ineffective and whether the trial court improperly admitted certain

evidence. Because we find that defense counsel's performance was not deficient and the evidence of gang-related activities was relevant to establish motive, we affirm.

Specifically, Lo claims that defense counsel was ineffective because: (1) he failed to bring a motion *in limine* to exclude irrelevant and prejudicial photographs; (2) he failed to object to the State's use of a notebook which the court later refused to admit into evidence; (3) he questioned a defense witness so as to open the door to unfavorable testimony on cross-examination; (4) he failed to object to testimony that Lo had been involved in a robbery; and (5) he failed to object to testimony about a gun shop burglary on hearsay grounds. Lo also claims that the trial court erred by admitting evidence of gang-related activities and by allowing a ballistics expert to testify concerning a bullet used in a different shooting.

BACKGROUND

This case involves a shooting which took place in Hood Park in La Crosse on July 6, 1995. By the time the trial started, it was undisputed that Anou Lo had shot Koua Vang in the park that night. It was also undisputed that both Lo and Vang were carrying handguns at the time of the shooting. Lo further admitted that he went to the park that night to confront Vang. It was also undisputed that, at the time of the shooting, Vang was a member of a gang called the TMC. The State's position was that Lo was a member of or involved with a rival gang called the Imperial Gangsters ("IG"). Lo admitted to having been a member of the gang before it became known as the IG, but claimed that he was no longer part of the gang. The prosecution's position was that Lo was still affiliated with the IG and that he had sought out and shot at Vang in retaliation for some

previous shootings involving TMC and IG members. The defense argued that Lo shot in self-defense.

ANALYSIS

a. Evidence of Gang-Related Activities

Since many of Lo's claims of error concern whether it was proper to admit evidence of gang-related activities, we will consider this issue first. Lo argues that the evidence of gang-related activities is irrelevant because the State did not prove that he was a member of the IG and because he had admitted that he went to the park to confront Vang. The State argues that the evidence of gang-related activity was all relevant to establishing Lo's motive for committing the shooting and to disprove that he was acting in self-defense. We agree.

Evidence is relevant if it has the tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. Section 904.01, STATS. To be relevant, "an item of proof need not prove the matter by itself; it need only be a 'single link in the chain of proof.'" *State v. Brewer*, 195 Wis.2d 295, 309, 536 N.W.2d 406, 412 (Ct. App. 1995) (quoted source omitted) (evidence of gang-related activity admissible to prove that the defendant's house was a base of operation for the sale of drugs).

In this case, the State argues that the evidence of gang-related activities was relevant to show that Lo was either a member of or involved with the IG gang. The prosecution wanted to show that Lo shot Vang as an act of gang retaliation. In order to prove this, the State needed to prove the existence of the IG gang; that the gang engaged in violent activities; and, that Lo was connected with

the gang. The evidence of gang-related activities, the State argues, established the motive for Lo to have gone armed to the park and to have shot Vang. We agree that evidence of gang-related activities was relevant in this case to establish Lo's motive for shooting Vang.

Even if relevant, however, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Section 904.03, STATS. Lo claims that this is true of the gang-related evidence in this case, largely because he acknowledged to having had a motive to shoot Vang—"bad blood" between them. Thus, Lo claims that the probative value of the gang evidence was slight and that it unfairly prejudiced him. We disagree.

A defendant may not preclude the State from introducing relevant evidence by claiming that an issue is not in dispute. See *State v. Plymesser*, 172 Wis.2d 583, 594-95, 493 N.W.2d 367, 372 (1992) (evidence relevant to motive is admissible whether or not defendant disputes motive). And, evidence is unfairly prejudicial only if it "tends to influence the outcome by improper means, or it appeals to the jury's sympathies, arouses its sense of horror, promotes its desire to punish, or otherwise causes the jury to base its decision on extraneous considerations." *State v. Patricia A.M.*, 176 Wis.2d 542, 554, 500 N.W.2d 289, 294 (1993). Lo has not convinced us that the gang-related evidence admitted during his trial caused the jury to find him guilty based on improper or extraneous considerations. The probative value of the gang-related evidence was thus not substantially outweighed by the danger of unfair prejudice.

b. Ineffective Assistance of Counsel

To establish an ineffective assistance of counsel claim, a defendant must show both that counsel's performance was deficient and that he was prejudiced by the deficient performance. See *Strickland v. Washington*, 466 U.S. 668, 687 (1984). A reviewing court may dispose of a claim of ineffective assistance of counsel claim on either ground. Consequently, if counsel's performance was not deficient the claim fails and this court need not examine the prejudice prong. See *State v. Moats*, 156 Wis.2d 74, 101, 457 N.W.2d 299, 311 (1990).

There is a strong presumption that counsel rendered adequate assistance. *Strickland*, 466 U.S. at 690. Professionally competent assistance encompasses a "wide range" of behaviors and "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.* at 689. To meet the prejudice test, Lo must show that, but for defense counsel's unprofessional errors, the result of the proceeding would have been different. *State v. Sanchez*, 201 Wis.2d 219, 236, 548 N.W.2d 69, 76 (1996).

We review the denial of an ineffective assistance claim as a mixed question of fact and law. See *Strickland*, 466 U.S. at 698. We will not reverse the trial court's factual findings unless they are clearly erroneous. However, we review the two-pronged determination of defense counsel's performance independently as a question of law. See *State v. Johnson*, 153 Wis.2d 121, 128, 449 N.W.2d 845, 848 (1990).

Lo presents five reasons why defense counsel was ineffective. Lo first asserts that his defense counsel failed to make a motion *in limine* to exclude certain photographs which showed Lo's friends and relatives involved in gang-related activities. We agree with the State that this evidence was relevant to establishing motive by showing Lo's affiliation with the IG gang. Since the evidence was relevant and properly admitted, defense counsel's performance was not deficient for failing to make a motion *in limine* to exclude it.

Secondly, Lo claims that his defense counsel's performance was deficient because he did not object when the prosecutor asked Lo to read some portions of a notebook which the trial court later refused to admit into evidence. Again we conclude that this evidence was relevant to establishing motive and that had defense counsel objected at the time, the trial court properly could have allowed the evidence. Again, since the evidence was relevant, defense counsel was not deficient for not objecting to it. Further, we point out that, on redirect, defense counsel asked Lo whether he had written the things he had read from the notebooks. Lo responded that he had not. With this testimony, and given the overwhelming evidence of Lo's guilt, if it was deficient performance to fail to object to this testimony, Lo was not prejudiced by the error.

The third reason Lo claims his counsel's performance was deficient is because his counsel called Lo's foster parent, Louis McGuire, as a witness and asked him whether he was aware of any episodes that would have gotten Lo into any trouble. McGuire responded that he was not. This, Lo claims, opened the door to cross-examination questions concerning a sexual assault Lo had committed while living with McGuire. In Wisconsin, cross-examination is not limited to the scope of direct examination. See *Rogers v. State*, 93 Wis.2d 682, 689, 287

N.W.2d 774, 777 (1980). Consequently, the State could have asked this question even if defense counsel had not asked about other episodes.

The issue, therefore, is really whether it was deficient performance for defense counsel to have called McGuire to testify at all. As the State points out, defense counsel was presented with a very difficult task. The focus of the defense strategy was to try to distance Lo from the gang activity. This witness had some evidence to offer which would support that position. The decision whether to call this witness was a matter of trial strategy. Even if it appears, with hindsight, that a different decision may have been more effective, “the strategic decision will be upheld as long as it is founded on rationality of fact and law.” *Brewer*, 195 Wis.2d at 300, 536 N.W.2d at 409. Given the situation confronting defense counsel, his decision to call McGuire to testify on behalf of his client was a rational one and did not constitute deficient performance.

The next assertion of error is that his defense counsel’s performance was deficient because he failed to object to testimony by a police officer that Lo was involved in a gun shop burglary in Iowa. The State points out that the officer did not testify that Lo had been involved in the robbery, and that defense counsel did object as soon as the officer began to testify about the gun shop burglary. The record bears out the State’s position.

Lo goes on to argue that the officer later testified that the gang which was the predecessor to the IG had been involved in armed robberies. Lo argues that defense counsel should have objected to this testimony because the jury may have thought the officer was testifying about the same incident. To the extent that the second robbery concerned gang-related activities, we conclude as discussed above, that it was relevant to establishing motive. Once again, failing to object to

relevant evidence does not constitute deficient performance. Moreover, as the State asserts in its brief, even if this were deficient performance, Lo has not established any prejudice. This testimony tended to show that the gangs were involved in criminal activities. There was certainly enough other evidence to establish that fact.

The final reason Lo gives for claiming his counsel was ineffective is that he failed to object to a police officer's testimony about a different gun shop burglary which occurred in Holmen, Wisconsin. The officer testified that he had retrieved one of the stolen guns from the home of a friend of Lo's. He did not testify that Lo had been involved in the burglary. Lo argues, however, that this testimony was "other acts" evidence, and that the State did not follow the proper procedures for admitting such evidence pursuant to § 904.04(2), STATS. We agree with the State that this was not "other acts" evidence. Other acts evidence is prohibited if it is offered to prove the character of the person "to show that the person acted in conformity therewith." Section 904.04(2). This testimony was not offered to show that Lo's friend was acting in conformity with her past behaviors. Instead, it was offered to show a connection between Lo and the IG gang. Therefore, it was not prohibited by § 904.04(2).¹

This was a five-day trial during which much testimony was taken and evidence presented. Defense counsel was presented with a very difficult task. While with hindsight, we might conclude that different choices could have been made, we cannot say that the choices defense counsel made constituted deficient

¹ Lo also appears to argue that the testimony should have been excluded as hearsay but he does not explain why. Even if the testimony was improper, however, Lo has not demonstrated that but for the testimony, the result of the trial would have been different. Therefore he has not established that he was prejudiced by it.

performance or that different choices would have made any difference whatsoever in the ultimate outcome of the trial. We agree with the trial court that, although there are different ways to try a case, there was nothing Lo's defense counsel could do to change the facts. Lo simply has not established either that his defense counsel's performance was deficient, or that he was prejudiced by any possible mistakes defense counsel may have made.

c. Other Evidentiary Objections

Lo also claims that the trial court erred by admitting evidence of gang activities and by allowing evidence from a ballistics expert that a bullet used in a previous incident was fired from the same gun that Lo used to shoot Vang. The admissibility of evidence is within the discretion of the trial court, and we will not reverse the trial court's decision to allow the admission of 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. *Brewer*, 195 Wis.2d at 305, 536 N.W.2d at 410. Again, as we have discussed above, we conclude that the evidence concerning gang activities was relevant to establish Lo's motive for the shooting, and that it was not unfairly prejudicial. The State argues that the evidence of the ballistics expert was also relevant to show gang affiliation and hence motive. We agree. Therefore, we affirm the judgment of the trial court and the postconviction order denying Lo's motion for a new trial.

By the Court.—Judgment and order affirmed.

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

