COURT OF APPEALS
DECISION
DATED AND FILED

December 10, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-0229-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

DEQUELVIN M. DOUGLAS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Kenosha County: S. MICHAEL WILK, Judge. *Affirmed.*

Before Brown, Nettesheim and Anderson, JJ.

PER CURIAM. Dequelvin M. Douglas appeals from a judgment of conviction of first-degree intentional homicide while armed and first-degree recklessly endangering safety while armed. He also appeals from an order denying his motion to modify his parole eligibility date. He claims that evidence of gang membership was improperly admitted, that a firearms expert's testimony exceeded permissible boundaries, that the trial court erroneously exercised its

discretion in setting his parole eligibility date beyond his life expectancy, and that the eligibility date constitutes cruel and unusual punishment. We affirm the judgment and the order.

On March 30, 1995, fifteen-year-old Douglas had an encounter with Solomon Bankhead and Jerry Darden in front of Douglas's home. Bankhead was known as the leader of the Gangster Disciples in Kenosha. Darden was considered Bankhead's bodyguard and a person who would beat up a person at Bankhead's direction. One of Douglas's companions refused Bankhead's request to act against another person. As a result of a subsequent verbal exchange, Darden took hold of one of Douglas's companions. At that point, Douglas retrieved a firearm from his residence. With baiting from Bankhead, Douglas fired three shots which struck Bankhead in the groin, right forearm and lower left rib cage. Darden took off running and Douglas followed. Douglas was shooting as he ran after Darden. Darden died in a nearby parking lot from a single gunshot wound that entered through his lower back. Bankhead survived the shooting.

The theory of defense was that Douglas acted in self-defense. Douglas testified that he knew Bankhead and Darden were gang members and would do anything to get what they wanted. He retrieved the firearm because he thought Darden was going to kill his companion. He just intended to scare Bankhead and Darden away. He believed that Bankhead had a gun and was going to shoot him. After shooting Bankhead, he chased Darden in fear that Darden would kill him for shooting his leader.

The prosecution's theory was that this was an inter-gang dispute and that Douglas was tired of Bankhead's leadership. According to one witness at the scene, Douglas remarked to Bankhead that "I'm tired of your shit." One witness

indicated that Douglas and Bankhead had made threatening remarks against each other the week before the shooting.

In his direct examination, Douglas denied having ever met Bankhead and Darden before the date of the shooting. He denied being a member of the Gangster Disciples. On cross-examination Douglas admitted that he had made an art project in school which depicted in detail symbols of the Gangster Disciples: the Star of David, a gun and the number 187. He commented that he had just seen those symbols around but did not know what they meant at the time that he carved them on his art project. Douglas also denied ever wearing a hat with a "G" on it and wearing it tilted to the right.

Douglas's art project was put into evidence. As part of its rebuttal case, the prosecution introduced the testimony of Ruben Silguero, a Kenosha police officer specializing in gangs. Silguero reported that while working at the junior high school Douglas attended, he had confiscated Douglas's art project because it had to do with gang affiliation. Silguero described the significance of the Star of David, the gun and the number 187 depicted on the art project.[1] He reported that he had seen Douglas wear a Green Bay Packer baseball cap with the bill titled to the right. Silguero described that the Gangster Disciples wore those caps because of the "G" on them and that the bill would be titled to the right or left to show a certain affiliation. Silguero had concluded that Douglas affiliated himself with the Folks Nation.

[1] Silguero explained that the Star of David was a gang symbol representing affiliation with the Folks Nation and that the number 187 was a gang phrase for murder.

Douglas argues that the admission of his art project and Silguero's testimony was improper because Douglas's possible gang membership was irrelevant. He characterizes the prosecution's attempt to label him as a gang member as improper other bad acts evidence under § 904.04, STATS.

We will not reverse a trial court's discretionary determination to admit evidence where it has a reasonable basis and was made in accordance with accepted legal standards and the facts of record. *See* ***State v. Hereford***, 195 Wis.2d 1054, 1065, 537 N.W.2d 62, 66 (Ct. App. 1995). The test of relevancy and the limits imposed by § 904.04, STATS., on admitting other acts evidence is often applied by this court and need not be repeated here. *See* ***id.*** at 1066-67, 537 N.W.2d at 67.

The issue in this case was not who did the shooting, but why and with what intent. Douglas's theory that he was acting in self-defense against the advances of Bankhead and Darden necessarily entailed the development of the victims' reputations for gang affiliation and the consequential violence and weaponry associated with that affiliation. Indeed, the confrontation itself started with gang-related requests of Douglas's companions. The gang affiliation of the victims, Douglas's companions and other witnesses was explored at trial by both the defense and the prosecution. Douglas's own gang affiliation was part and parcel of developing the circumstances of the crime. "Testimony of other acts for the purpose of providing the background or context of a case is not prohibited by § 904.04(2), STATS." ***Hereford***, 195 Wis.2d at 1069, 537 N.W.2d at 68. *See also* ***State v. Clemons***, 164 Wis.2d 506, 514, 476 N.W.2d 283, 286 (Ct. App. 1991) (other acts evidence admissible if necessary to give a complete presentation of the case at trial).

Additionally, Douglas's gang affiliation was also relevant to motive. There was evidence that Bankhead was angry about the failure of certain people and gang members to adhere to the requirements of the gang. Douglas's own membership and resistance to Bankhead's leadership were therefore relevant to establish that Douglas did not act out of fear alone.

The evidence of Douglas's gang affiliation was relevant and admissible under the exceptions listed in § 904.04, STATS. Contrary to Douglas's assertion, Silguero's testimony was not speculative and did not lack probative value. In light of the evidence about the victims' gang membership, the prejudicial effect of the evidence of Douglas's membership did not outweigh its probative value. The trial court properly exercised its discretion in admitting the evidence.[2]

The weapon Douglas used in the shooting was never recovered. Based on the recovered bullet cartridges, a firearms expert identified the gun as a "Tech-9" or something similar. A Tech-9 gun was presented for demonstration purposes. In response to the prosecutor's inquiry about whether the Tech-9 is "a sporting weapon," the expert replied that "it could not be used for deer hunting or even small game hunting in the State of Wisconsin." The expert subsequently explained that he had only been called upon to examine such guns as a result of confiscation during a drug raid or use in a shooting or armed robbery. Douglas claims that the evidence that the gun is used in criminal activity is a form of

[2] Based on our conclusion that the art project and Silguero's testimony were independently relevant, we reject Douglas's claim that the evidence only served to impeach his testimony that he was not a gang member and was impeachment on collateral matters by extrinsic evidence and prohibited by § 906.08(2), STATS. *See* ***State v. Johnson***, 181 Wis.2d 470, 493 n.13, 510 N.W.2d 811, 819 (Ct. App. 1993).

impermissible other bad acts evidence. He suggests that the evidence allows the jury to infer that he is an individual likely to intentionally kill another because of his possession of a "criminal" weapon.

Even if the expert's testimony that the gun was not a hunting weapon and is used for illegal activity was error, it was harmless error. An error is harmless in a criminal case if there is no reasonable possibility that the error contributed to the conviction. *See* ***State v. Dyess***, 124 Wis.2d 525, 543, 370 N.W.2d 222, 231-32 (1985). We consider whether there is a reasonable possibility of a different outcome, or a "'probability sufficient to undermine confidence in the outcome' of the proceeding." ***Id.*** at 544-45, 370 N.W.2d at 232 (quoting ***Strickland v. Washington***, 466 U.S. 668, 694 (1984)).

The jury was already aware that the weapon could be used in shooting human beings, as Douglas's conduct demonstrated. The cat was already out of the bag that the gun could be used for illegal purposes. The expert did not say anything that the jury could not already discern from the evidence. This is particularly true in light of Douglas's young age and the fact that he was not a gun collector, hunter or police officer authorized to have such a weapon. There was but one inference that arises from Douglas's possession of a Tech-9. The expert's testimony that others used the gun for illegal purposes had no impact.

Douglas seeks a new trial in the interest of justice. *See* § 752.35, STATS. He claims that the real controversy has not been tried because the improper admission of evidence clouded the crucial issue before the jury. *See* ***State v. Smith***, 153 Wis.2d 739, 742, 451 N.W.2d 794, 795-96 (Ct. App. 1989). We deny the request for a new trial based on our conclusion that evidence

suggesting that Douglas was a gang member was properly admitted and that the testimony from the firearms expert was, if error, harmless error.

Douglas was subject to a mandatory life sentence on the first-degree intentional homicide conviction. The trial court set a December 19, 2054 parole eligibility date.[3] Douglas's claim that the trial court exceeded its authority in setting an eligibility date beyond his life expectancy[4] is controlled by ***State v. Setagord***, 211 Wis.2d 397, 414, 565 N.W.2d 506, 513 (1997). The trial court has authority to impose a parole eligibility date beyond a defendant's expected lifetime. *See* ***id.***

We turn to Douglas's claim that the trial court erroneously exercised its discretion in setting the eligibility date beyond his life expectancy. "The factors that a sentencing court considers when imposing a sentence are the same factors that influence the determination of parole eligibility." ***Id.*** at 416, 565 N.W.2d at 514. The three primary factors to be considered are the gravity of the offense, including the effect on the victim; the character of the offender, including his or her rehabilitative needs and the interests of deterrence; and the need for protecting the public. *See* ***id.***

Parole eligibility determinations are reviewed under the same standards applicable to other sentencing decisions. *See* ***id.*** A strong presumption of reasonableness is afforded the trial court's determination of the parole

[3] Douglas indicates that as a consequence of the additional consecutive sentences imposed, his actual parole eligibility date is June 19, 2058.

[4] According to the statistics cited by Douglas, a black male born in 1980 has a life expectancy of 63.8 years. It was extrapolated that Douglas is only projected to live until between the years 2043 to 2046.

eligibility date because the trial court is in the best position to consider the relevant factors and assess the defendant's demeanor. *See* ***id.*** at 418, 565 N.W.2d at 514. The defendant has the burden to establish that the trial court's determination is unreasonable. *See* ***id.*** "We will find an erroneous exercise of discretion when a sentence is so excessive and unusual, and so disproportionate to the offense committed, as to shock public sentiment and violate the judgment of reasonable persons concerning what is right and proper under the circumstances." ***Id.***

Douglas argues that the trial court failed to consider his rehabilitative needs. He contends that "a defendant who commits an offense at age fifteen should be afforded an opportunity to eventually prove to authorities that he is worthy of being returned to society."

The trial court looked at the premeditated and aggravated viciousness of the crime. It characterized Douglas as an "urban terrorist." The court specifically found that potential rehabilitation "has to take a back seat" to considerations of the nature of the crime, the need for deterrence and the need to protect the public. The weight given to each of the sentencing factors is left to the sentencing court's broad discretion. *See* ***State v. Thompson***, 172 Wis.2d 257, 264, 493 N.W.2d 729, 732 (Ct. App. 1992). We are not persuaded that the trial court gave too much weight to the nature of the crime.

With a compelling quotation from a Nevada case, Douglas suggests that the extended parole eligibility date for a sixteen-year-old constitutes cruel and unusual punishment.[5] The trial court considered Douglas's age as a mitigating

[5] Douglas cites ***Naovarath v. State,*** 779 P.2d 944, 947 (Nev. 1989):

> What constitutes cruel and unusual punishment for a child presents an especially difficult question. Under Nevada statutory

(continued)

factor. However, it noted that Douglas had committed an adult crime and would therefore be treated like an adult. This was proper based on the laws permitting adult treatment of a juvenile. The trial court properly exercised its discretion in considering the appropriate factors and the facts of record. We are not persuaded that based on Douglas's age alone, the parole eligibility date is excessive or constitutes cruel and unusual punishment.

By the Court.—Judgment and order affirmed.

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

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law, since 1985, a child may be charged, convicted and sentenced for murder. For all other purposes the defendant in this case, a child, a seventh grader at the time of the incident, is almost entirely legally incapacitated. A child may not vote; a child may not serve on a jury. A child may not drink or gamble; a child of Naovarath's age may not even drive an automobile. We may possibly have in the child before us the beginning of an irremediably dangerous adult human being, but we certainly cannot know that fact with any degree of certainty now. If putting this child away until his death is not cruel, it is certainly unusual. To adjudicate a thirteen-year-old to be forever irredeemable and to subject a child of this age to hopeless, lifelong punishment and segregation is not a usual or acceptable response to childhood criminality, even when the criminality amounts to murder.