COURT OF APPEALS
DECISION
DATED AND FILED

May 12, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-2349-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KOUA XIONG,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Brown County: WILLIAM M. ATKINSON, Judge. *Affirmed.*

Before Cane, P.J., Myse and Hoover, JJ.

PER CURIAM. Koua Xiong appeals his sentence for his armed robbery conviction, as a party to the crime, and his automobile theft conviction, after a plea of no contest. As part of the crime, Xiong and three other gang members broke into a home, terrorizing and assaulting the mother, father, and young girl who occupied it. The trial court sentenced Xiong to a twenty-year term

on the armed robbery conviction and a five-year concurrent term on the automobile theft conviction. The trial court remarked during sentencing that Xiong may have kicked the three-year-old girl and pointed a gun at the father during the crime. In its postconviction decision, the trial court stated that it had placed no weight on such matters in imposing the twenty-year and five-year concurrent sentences. Rather, it emphasized the role that the nature of the crime and other factors played in the sentence.

On appeal, Xiong makes three basic arguments intended to distance himself from his associates and thereby attempt to gain a lesser sentence: (1) he was less culpable than others by virtue of his lesser, more passive role at the scene and thereby deserved a lesser sentence; (2) the trial court improperly gained information from accomplices' presentence reports (PSI's) in violation of due process, including a false claim that Xiong had kicked the girl and pointed a gun at the father during the crime; and (3) Xiong's remorse merited a lesser sentence, and the trial court wrongly gave little weight to it.

The trial court made a discretionary decision, *see* ***State v. Macemon***, 113 Wis.2d 662, 667-68, 335 N.W.2d 402, 405-06 (1983), dependent on the seriousness of the offense, the character of the defendant, the public's need for protection, and the interests of deterrence, s*ee* ***State v. Sarabia***, 118 Wis.2d 655, 673-74, 348 N.W.2d 527, 537 (1984). We reject Xiong's arguments and therefore affirm his sentence.

The trial court made specific sentencing findings. At the outset, the trial court noted that the robbery formed part of a violent, brutal home invasion, in which a father, mother, and child suffered injuries at the hands of gang members. The trial court observed that no one knew exactly what everyone did that night or

whose kicking, gun wielding, or other acts contributed most to the victims' physical and emotional injuries. The trial court did know that Xiong was a long-time gang member. He had switched from one gang to another and continued these unsavory affiliations during probation on former crimes. The trial court observed that gang members fed off each other in general and that their massed force emboldened them that night in particular. The trial court noted the gang's brutality, remarking how the home invaders clubbed the father and mother with a baseball bat and the father again with a handgun. The last intruder left after the mother slipped into a bedroom and re-emerged brandishing her own .357 handgun.

The trial court reviewed Xiong's extensive juvenile and adult record that together totaled at least ten serious offenses. As the trial court observed, Xiong had been more than a shoplifter and truant as a juvenile, and his chain of recidivism caused the court great concern. It stood in stark contrast to Xiong's letter to the court praying for leniency and forgiveness. In that letter, Xiong expressed a good deal of remorse and proclaimed his new-found religious views. As a sign of remorse, his letter quoted the traditional hymn, *Amazing Grace*: "I was once lost, but now I'm found; I was once blind, but now I see." The trial court viewed most of this with skepticism. It noted how Xiong had sometimes done well in confined settings but usually reverted to crime on release. The trial court also suspected that Xiong's remorse stemmed partly from his fast-approaching punishment, not simply from a sense of guilt. The trial court alluded to the need to protect the innocent and punish the guilty. The weight to be given these many factors was discretionary. *See* ***Ocanas v. State***, 70 Wis.2d 179, 185, 233 N.W.2d 457, 461 (1975).

The trial court's findings supplied good grounds for Xiong's twenty-year and five-year concurrent sentence, and we see no misuse of sentencing

discretion. The trial court's findings showed a violent crime by a violent person. They detailed Xiong's serious character defects, the grave risks he posed to the public, and his past failures after supervision. The trial court also had evidence that Xiong had more than a petty role in the crime, independent of any information the trial court may have gained from his associates' PSI's. The trial court had evidence from various hearings that Xiong wore a mask, struck the young girl with a rope, and helped search the home for valuables. The trial court also explained that he spoke of the other wrongdoers' PSI's simply to show the variations in their accounts, their mutual recriminations, and the resulting difficulty in knowing exactly who did what to whom that evening. We see nothing wrong in the trial court's use of the PSI's, any gross unfairness to Xiong, or a violation of due process. *See* ***Bruneau v. State***, 77 Wis.2d 166, 174-75, 252 N.W.2d 347, 351 (1977).

Moreover, the main premise of Xiong's appeal is doubtful. As a starting point, Xiong believes that the trial court had a duty to view him as less culpable than his associates, by virtue of his claimed lesser, more passive role on the scene than some of his associates. In the eyes of the law, however, Xiong was just as guilty as the others; a dominant, commanding role was not essential. Xiong shared in a violent break-in in a material way, in concert with others, standing ready at the scene to assist or prevent interference in the crime if necessary, for the purpose of lending aid, comfort, and encouragement. *See* CLARK & MARSHALL, CRIMES § 8.02, at 512, & § 8.05, at 521 (7th ed. 1967) (*citing* cases); *see also* LAFAVE & SCOTT, CRIMINAL LAW § 63, at 497-98 (1972) (*citing* cases). Xiong's readiness to give aid, comfort, and encouragement was essential to the crime's success and plainly emboldened the others. This made him equally culpable. It

empowered the trial court to sentence Xiong like the others and relieved the court of a duty to try to rank the associates' relative degrees of guilt.

This also made Xiong's other claims immaterial. He claimed that he never kicked the young girl or pointed a gun at the father. He also claimed that the trial court wrongly sought and gained such information from associates' PSI's, in violation of due process. Xiong's sentence finds ample support in his admitted role in the crime and his past record; the trial court's reference to the kicking and gun incidents, regardless of their propriety, were therefore not material to the sentence in the final analysis. The trial court could also reasonably discount Xiong's remorse in its sentencing calculus. While remorse is a relevant factor, *see* ***Harris v. State***, 75 Wis.2d 513, 519, 250 N.W.2d 7, 11(1977), trial courts have a great deal of freedom on such questions, s*ee* ***State v. Curbello-Rodriguez***, 119 Wis.2d 414, 434, 351 N.W.2d 758, 768 (Ct. App. 1984). Wrongdoers' remorse on sentencing day is commonplace. The trial court could reasonably view Xiong's with skepticism and give it little weight compared to other factors, such as the degree of Xiong's guilt, the proven defects in his character, and the need to protect the innocent.

By the Court.—Judgment and order affirmed.

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