

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 4, 2001

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. 01-0504-CR

Cir. Ct. No. 99-CF-155

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

ANTONIA HERRERA, JR.,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Polk County:
JAMES R. ERICKSON, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Antonio Herrera, Jr., appeals a judgment convicting him of first-degree intentional homicide, armed robbery and burglary while armed as a party to the crimes. He argues that the trial court erroneously exercised its discretion when it denied his motion in limine to prevent the State

from informing the jury of Herrera's gang membership and the significance of a teardrop tattoo on his face. We reject that argument and affirm the judgment.

¶2 Herrera and his accomplice, Jasper Foote, confessed to police that they entered Ron Bisson's residence with intent to steal and, during the course of the burglary, beat Bisson to death and slit his throat. Foote testified against Herrera, admitting his participation in the crimes but stating that he killed Bisson at Herrera's direction because he was afraid of Herrera. The primary issue at trial was whether Herrera participated in the killing by encouraging and threatening Foote.

¶3 In his pretrial motion, Herrera sought an order precluding the State from introducing evidence of Herrera's gang membership and the significance of a teardrop tattoo on his face. Witnesses indicated that the teardrop tattoo is "earned" by killing someone. The court denied the motion in limine, and the State presented evidence from Foote, interrogating officers, a jailhouse informant and Herrera's cousin that Herrera was a gang member who sought a higher rank in the gang by killing Bisson. Herrera instructed Foote to murder Bisson so that Foote could earn the teardrop tattoo and Herrera could enhance his stature in the gang. Foote testified that Herrera threatened him and his family to induce his cooperation and that he was afraid of Herrera because of his gang affiliation and Herrera's teardrop tattoo. Herrera contends that this evidence was irrelevant and, if relevant at all, more prejudicial than probative.

¶4 The admissibility of evidence is committed to the trial court's discretion. *See State v. Doerr*, 229 Wis. 2d 616, 621, 599 N.W.2d 897 (Ct. App. 1999). The trial court properly exercised its discretion when it concluded that evidence of Herrera's gang affiliation and the significance of the teardrop tattoo

were relevant to establish motive and intent, and to explain why Foote felt sufficiently intimidated to commit murder. Relevant evidence is evidence that tends to make the existence of any fact of consequence more or less probable. *See WIS. STAT. § 904.01.*¹ Foote's motive (fear of Herrera) and Herrera's motive (increased stature in the gang) bear on their intent. *See State v. Johnson*, 121 Wis. 2d 237, 253, 358 N.W.2d 824 (Ct. App. 1984). Evidence of their motivation is an appropriate "link in the chain" of proof of their intent. *See State v. Brewer*, 195 Wis. 2d 295, 309, 536 N.W.2d 406 (Ct. App. 1995). The evidence also was relevant because it connects Herrera to the murder, showing that he was not merely a bystander.

¶5 The trial court properly exercised its discretion when it determined that the evidence of gang membership and the significance of the tattoo were not substantially more prejudicial than probative. All inculpatory evidence prejudices a defendant. The question is whether the danger of unfair prejudice exceeds its probative value. *See State v. Bergeron*, 162 Wis. 2d 521, 532, 470 N.W.2d 322 (Ct. App. 1991). Because the primary issue in this trial was whether Herrera did or said anything to assist or encourage Foote in the commission of the crime, Herrera's and Foote's motives were highly probative. The reasons Foote feared Herrera, despite the difference in their physical stature, was necessary to the jury's understanding of the case. Most of this evidence consists of statements Herrera made to other witnesses describing his motives and intent. This evidence was not merely gratuitous information about him, but was, in Herrera's own words, intrinsically part of the criminal episode. While the evidence was prejudicial to

¹ All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

Herrera, the trial court reasonably concluded that the danger of unfair prejudice did not substantially outweigh its probative value. *See* WIS. STAT. § 904.03.

By the Court.—Judgment affirmed.

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

