COURT OF APPEALS
DECISION
DATED AND FILED

August 28, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-1710-CR **Cir. Ct. No. 99-CF-553**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

FERNANDO R. MATOS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Racine County: EMILY S. MUELLER, Judge. *Affirmed*.

Before Brown, Anderson and Snyder, JJ.

¶1 PER CURIAM. For his role as the driver in a gang-related drive-by shooting, Fernando R. Matos was convicted of first-degree intentional homicide, four counts of attempted first-degree homicide, intentionally discharging a firearm

from a vehicle into a building, and four counts of intentionally discharging a firearm towards a person.[1] He appeals from the judgment of conviction and an order denying his motion for postconviction relief. He argues that the jury view was conducted in violation of his right to confrontation, that his statement was the result of an unlawful arrest, that an anonymous jury was not necessary, and that evidence of gang affiliation should have been excluded because he offered to stipulate to gang membership. We conclude that there was no reversible trial error and affirm the judgment and order.

¶2 On the first day of trial, the jury was taken out to view the home where the drive-by shooting occurred and two nearby sites from which witnesses made observations. The jurors, attorneys, and trial court judge rode to the sites on a bus. Matos rode in an unmarked squad car and never got out of the car. The jurors exited the bus at the crime scene and the trial court pointed out the setback of the house from the curb and bullet holes on the front of the house. Matos argues that he was denied his constitutional right to confrontation and due process because he was not present when the court spoke to the jury during the jury view.[2]

¶3 We conclude that under the doctrine of judicial estoppel, Matos cannot challenge the way the jury view was conducted. We said in ***State v. Michels***, 141 Wis. 2d 81, 97-98, 414 N.W.2d 311 (Ct. App. 1987), that a position

[1] All the convictions included penalty enhancers for commission while armed, for being gang related, and for being within a school zone. *See* WIS. STAT. § 939.625(1)(a), 939.63(1)(a) and 939.632(2) (1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

[2] The claim is based on the right to present at "every stage of his trial" as encompassed in the Sixth Amendment confrontation clause. *See* ***Illinois v. Allen***, 397 U.S. 337, 338 (1970). For the first time in his reply brief, Matos also suggests a violation of WIS. STAT. § 971.04(1)(e), which states that the defendant shall be present at any view by the jury.

on appeal which is inconsistent with that taken at trial is subject to judicial estoppel. This estoppel rationale is especially persuasive when a trial court performs some act because of the position taken by a party; that party should not be heard to take a different position on appeal. ***Id.***; ***State v. Washington***, 142 Wis. 2d 630, 635, 419 N.W.2d 275 (Ct. App. 1987).

¶4 Matos did not want the jury to view him in his custodial status. He asked to be taken to the jury view in a separate car and that he not get out of the car. He cannot now complain that he should have been present when the trial court spoke to jurors during the jury view. Also, Matos knew in advance what the trial court would point out to the jurors at each site.[3] While Matos argues that he was denied the effective assistance of trial counsel because no objection was made to the violation of his right to confrontation, he does not specifically attack the strategy reasons trial counsel advanced for not having him exit the car. Counsel did not want the jury to see Matos in custody or in restraints. It was a sound reason for requesting that Matos attend the jury view in a separate vehicle. *See* ***State v. Felton***, 110 Wis. 2d 485, 502, 329 N.W.2d 161 (1983) (trial counsel is not ineffective when a strategic decision is "based upon a rationality founded on the facts and the law"). The manner in which the jury view was conducted was not error.

¶5 Matos moved to suppress a statement he gave to police after being arrested several hours after the drive-by shooting. He claims there was no probable cause to arrest him and that the statements, although preceded by

[3] A record was made of the jury view after returning to the courtroom. There were no objections to the manner in which the view was actually conducted as it was consistent with the plan agreed to by the parties.

Miranda[4] warnings, were the product of an illegal arrest. It is undisputed that police phoned Matos at home and asked him to come outside and talk to them about the drive-by shooting. When Matos came out, he was arrested for an unrelated obstructing offense where he had falsely reported that a self-inflicted gunshot wound was the result of a robbery. Matos argues that police had probable cause to make that arrest weeks earlier or obtain an arrest warrant and that the arrest was a pretextual basis for taking him into custody so they could question him about the drive-by shooting that had just occurred.

¶6 In reviewing an order granting or denying a motion to suppress evidence, the trial court's findings of fact will be upheld unless they are clearly erroneous. ***State v. Secrist***, 224 Wis. 2d 201, 207, 589 N.W.2d 387 (1999). Whether probable cause for arrest exists requires an independent application of the relevant constitutional principles to the facts as found by the trial court. ***Id.*** at 208.

> Probable cause to arrest is the quantum of evidence within the arresting officer's knowledge at the time of the arrest which would lead a reasonable police officer to believe that the defendant probably committed or was committing a crime. There must be more than a possibility or suspicion that the defendant committed an offense, but the evidence need not reach the level of proof beyond a reasonable doubt or even that guilt is more likely than not.

Id. at 212 (citation omitted).

¶7 The trial court found that three weeks before his arrest, police had all the necessary information to arrest Matos for obstructing an officer and felon in possession of a firearm. Nothing occurred in the intervening period to negate the existing probable cause. Nor were officers required to obtain an arrest warrant

[4] ***Miranda v. Arizona***, 384 U.S. 436 (1966).

simply because there had been time to do so. ***Rinehart v. State***, 63 Wis. 2d 760, 766-67, 218 N.W.2d 323 (1974). Even if the arrest was pretextual, the officers' subjective intent to take Matos into custody so they could question him about the drive-by shooting does not render the arrest illegal as long as probable cause existed in the first instance. *See* ***State v. Gaulrapp***, 207 Wis. 2d 600, 609, 558 N.W.2d 696 (Ct. App. 1996). The ulterior motives of the officers does not invalidate the otherwise valid arrest. ***Whren v. United States***, 517 U.S. 806, 812-13 (1996). The trial court properly denied the motion to suppress the statement.

¶8 On the State's motion, an anonymous jury was impaneled. Matos argues that there was no demonstrated pattern of victim intimidation to support using an anonymous jury. He claims his right to a fair and impartial jury was violated because the use of an anonymous jury sent a message to the jurors that Matos was to be feared.

¶9 The use of an anonymous jury is within the discretion of the trial court. ***State v. Britt***, 203 Wis. 2d 25, 34, 553 N.W.2d 528 (Ct. App. 1996). The trial court must find a "strong reason to believe the jury needs protection" and take reasonable precautions to minimize prejudice to the defendant and ensure that his or her rights to a fair and impartial jury are protected.[5] ***Id.*** at 34, 36.

[5] Pending before the Wisconsin Supreme Court is ***State v. Tucker***, No. 00-3354 (certification granted Jan. 29, 2002), in which this court certified the question: "Whether ***Britt***'s holding that anonymous juries may be impaneled only if there is a strong reason the jury needs protection should continue to be the legal standard in Wisconsin." In ***Tucker***, the supreme court may modify the required standard in light of policy concerns that favor the use of anonymous juries as standard practice in criminal trials. It is not necessary to wait for the supreme court's decision because this case clearly falls under the higher standard of need adopted in ***Britt***.

¶10 An anonymous jury was appropriate in this case because the crime was part of a battle between rival gangs. *See* ***State v. Murillo***, 2001 WI App 11, ¶30, 240 Wis. 2d 666, 623 N.W.2d 187; ***Britt***, 203 Wis. 2d at 35-36. A gang enhancer was charged is this case. Prior to trial the special security measures that would be taken were discussed in order to protect not only witnesses, but Matos and other courtroom observers. The trial court had reason to be concerned about the combination of rival gang members as they waited in the hallway to give testimony. The defense itself conveyed to the court in pretrial hearings that threats had been made against Matos and his family. As the trial court noted, it was not relevant that the threats were not generated by Matos himself. It is permissible that the impetus for an anonymous jury comes from witnesses as well as from the defendant. *See* ***id.*** at 35. The court also noted that the charges involved violent crimes. We conclude that the court exercised its discretion in determining that the jury needed protection, and the record here amply supports the decision.

¶11 The trial court took reasonable precautions to minimize any prejudicial effects of the anonymous jury. The use of an anonymous jury was discussed outside the presence of the prospective jurors. The court simply informed the jurors that it was the court's practice to refer to each person by number. The trial court's advisement that the use of numbers was routine avoided the very inference of fear that Matos suggests. The names of the prospective jurors and the jury questionnaires were available to the parties. Matos was not denied his right to a fair and impartial jury.

¶12 The final issue is whether the trial court erred in admitting photographs of Matos wearing gang colors and holding guns and drawings of gang graffiti. Matos argues that his willingness to stipulate to gang membership should have closed the door on the admission of the photographs and drawings. *See* ***State***

v. Wallerman, 203 Wis. 2d 158, 167, 552 N.W.2d 128 (Ct. App. 1996), *modified*, ***State v. Veach***, 2002 WI 110, No. 98-2387-CR (a defendant may stipulate to the element of the crime for which "other acts" evidence is being offered to avoid admission of the evidence). Matos also argues that the trial court failed to employ the three-step analysis used to determine if other acts evidence is admissible. *See* ***State v. Sullivan***, 216 Wis. 2d 768, 772-73, 576 N.W.2d 30 (1998).

¶13 Evidentiary rulings are addressed to the trial court's discretion. *See* ***State v. Plymesser***, 172 Wis. 2d 583, 591, 493 N.W.2d 367 (1992). We will uphold the trial court's decision absent an erroneous exercise of its discretion. ***Id.*** at 585 n.1. In determining whether a defendant's stipulation precludes the admission of other acts evidence, the trial court must examine the breadth of the defendant's offer and assess whether the evidence would still be necessary even with the stipulation. ***Wallerman***, 203 Wis. 2d at 167. Matos was only willing to stipulate to gang membership, a fact not in dispute and testified to by many witnesses. The gang enhancer required more proof than mere gang membership. The State was required to prove that Matos acted "with the specific intent to promote, further or assist in any criminal conduct by criminal gang members." WIS. STAT. § 939.625(1)(a). Matos's offer to stipulate to membership did not relieve the State of the burden to prove this element of the gang enhancer and was not sufficient to exclude evidence. In other words, as in ***Wallerman***, the trial court had no basis to conclude that the State was merely piling on unnecessary evidence. *See* ***Wallerman***, 203 Wis. 2d at 170.

¶14 We recognize that the trial court was not obvious in its application of the three-step other acts analysis.[6] Yet the court touched on the three inquiries: that the evidence is relevant to one of the exceptions listed in WIS. STAT. § 904.04(2); that the evidence is relevant considering the two facets of relevance set forth in WIS. STAT. § 904.01; and that the evidence is shown to be more probative than prejudicial. *See* ***Sullivan***, 216 Wis. 2d at 772. The trial court found that the photographs and drawings were relevant and probative to demonstrate the depth of Matos's participation and familiarity with the gang. It found the evidence relevant to motive and intent with respect to the gang enhancer. While the court recognized that the evidence was prejudicial, it concluded that it was not unduly so, particularly in light of the testimony about the prevalence of guns in gangs and the ability to bring out on cross-examination that not every member of a gang carries a gun. We conclude that the court properly exercised its discretion in admitting the photographs and drawings.[7]

By the Court.—Judgment and order affirmed.

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

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[6] We view the trial court's approach as a consequence of how the issue was argued before it. Matos did not specifically object to admission of the evidence as impermissible other acts evidence. The trial court commented that it was not certain that the evidence constituted other acts evidence. We assume without deciding that the evidence constitutes other acts evidence under WIS. STAT. § 904.04(2).

[7] We summarily reject Matos's claim that the drawings and the detective's interpretation of them were hearsay and admitted in violation of his right to confrontation. The detective was qualified as a gang expert and fully subject to cross-examination. There was no error in this regard to support Matos's request for a new trial in the interests of justice under WIS. STAT. § 752.35.