COURT OF APPEALS
DECISION
DATED AND FILED

August 16, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP652-CR **Cir. Ct. No. 2004CF2483**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DARRYL ALLEN FLYNN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: DAVID A. HANSHER, Judge. *Affirmed*.

Before Higginbotham, P.J., Dykman and Vergeront, JJ.

¶1 PER CURIAM. Darryl Flynn appeals a judgment convicting him of first-degree reckless homicide with the use of a dangerous weapon. He argues: (1) that the circuit court should have allowed him to introduce evidence that the victim, Demetrian W., was a gang member; (2) that the circuit court should have

allowed him to introduce testimony from law enforcement officers about gangs; and (3) that the circuit court should have allowed him to introduce evidence of the gang affiliation of prosecution witnesses. We affirm.

¶2 Flynn first argues that the circuit court misused its discretion in prohibiting him from introducing testimony from third parties to show that the victim, Demetrian W., was a gang member. Flynn sought to introduce this evidence to show that he reasonably feared Demetrian W., thus bolstering his claim of self-defense. The circuit court permitted Flynn to introduce evidence about *his own belief* that Demetrian W. was a member of the Gangster Disciples based on what Flynn overheard Demetrian W. say to others. However, the circuit court would not allow Flynn to introduce testimony from other people about Demetrian W.'s reputation for gang activity or his gang tattoo because this evidence was not known to Flynn when he shot Demetrian W. and thus did not bear on Flynn's frame of mind during the shooting. We conclude the circuit court properly exercised its discretion in excluding such third-party evidence. Flynn's claim that he acted in self-defense must be evaluated by looking at what he reasonably believed when he shot Demetrian W., not at what other people knew or reasonably believed about Demetrian W. *See* WIS. STAT. § 939.48(1) and (4) (2005-06)[1]; *see* ***State v. Sullivan***, 216 Wis. 2d 768, ¶7, 576 N.W.2d 30 (1998)

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted. WISCONSIN STAT. § 939.48(1) provides:

> A person is privileged to threaten or intentionally use force against another for the purpose of preventing or terminating what the person reasonably believes to be an unlawful interference with his or her person by such other person. The actor may intentionally use only such force or threat thereof as the actor reasonably believes is necessary to prevent or terminate the interference. The actor may not intentionally use force which is intended or likely to cause death or great bodily

(continued)

(Other acts evidence is not admissible unless it "has a tendency to make [a] consequential fact … more probable or less probable than it would be without the evidence.").

¶3 Flynn also sought to introduce this evidence to corroborate his claim that Demetrian W. was the aggressor. Under this theory, Flynn contends that he did not need to be aware of Demetrian W.'s reputation for being in a gang or be aware of his gang tattoo because the evidence was admissible to show a propensity for violence. He cites ***McMorris v. State***, 58 Wis. 2d 144, 152 n.13, 205 N.W.2d 559 (1973), for the proposition that when evidence of propensity for violence is offered to corroborate other evidence that the victim of the assault was the aggressor, it is not necessary to show knowledge on the part of the defendant of the victim's aggressive character. Even if it is not necessary to show knowledge on the part of the defendant, an issue we do not decide, we reject this argument. ***McMorris*** provides that a defendant may show "the turbulent and violent character of the victim *by proving prior specific instances of violence* …." ***Id.*** at 152 (emphasis added). Demetrian W.'s gang membership and gang tattoo do not constitute specific instances of prior violence. The circuit court properly exercised its discretion in excluding this testimony.

¶4 Flynn next argues that the circuit court erroneously exercised its discretion in prohibiting him from introducing expert testimony by police officers

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> harm unless the actor reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or herself.

WISCONSIN STAT. § 939.48(4) allows a defendant to invoke this privilege to defend another person.

regarding terminology related to gangs. Flynn wanted to introduce this evidence to show that when Flynn overheard Demetrian W. talk about "folks" and "GD," Demetrian W. meant fellow gang members. Without deciding whether the circuit court erred in excluding this evidence, we conclude that, even if it was error, it was harmless. *See* ***State v. Dyess***, 124 Wis. 2d 525, 543, 370 N.W.2d 222 (1985) (An error is harmless if there is no "reasonable possibility that the error contributed to the conviction."). It is not plausible that the jury would have concluded that Flynn was not guilty of this crime if it had heard testimony from a police expert that the terms "folks" and "GD" refer to gangs. There was simply too much other evidence against Flynn. Five witnesses testified that Demetrian W. had raised his hands into the air when Flynn pointed the gun at him. Three witnesses who saw the shooting itself—including Flynn's girlfriend—testified that when Flynn fired the shot, Demetrian W. still had his hands raised into the air. Flynn was the only person who testified that Demetrian W. lowered his hands to reach for something in his waistband when Flynn fired the shot. We therefore conclude that any error was harmless.

¶5 Flynn next argues that the circuit court erroneously exercised its discretion in preventing him from questioning two prosecution witnesses about their gang affiliation. One of the witnesses, Obed L., allegedly belonged to the Latin Kings, and another witness, Dominique B., allegedly belonged to the Gangster Disciples, the same gang as Demetrian W. Flynn contends that this evidence showed bias on the part of the witnesses. We reject this argument. As to Obed L., his membership in a different gang than Demetrian W. does not show that he was biased in favor of Demetrian W.—if anything, it would tend to show the opposite. As for Barbee, the circuit court ruled that evidence of bias based on gang relationship might be admissible depending on "who testifies and what the

person says." The circuit court invited counsel to "approach me at sidebar and let me know what questions you want to ask. It may be relevant." Flynn does not contend that counsel raised the issue again. Under these circumstances, Flynn cannot argue that the circuit court erroneously exercised its discretion by preventing him from questioning Barbee about potential bias due to his gang affiliation.

¶6 Finally, Flynn contends we should reverse in the interests of justice. *See* WIS. STAT. § 752.35. We see no reason to do so.

By the Court.—Judgment affirmed.

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