COURT OF APPEALS
DECISION
DATED AND FILED

September 6, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP2390 **Cir. Ct. No. 1998CF479**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

THOMAS M. GARLAND,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Rock County: JAMES E. WELKER, Judge. *Affirmed*.

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

¶1 PER CURIAM. Thomas Garland appeals an order denying his WIS. STAT. § 974.06 (2005-06)[1] postconviction motion. The motion challenged the admissibility of parts of two witnesses' testimony, both of which were introduced to show Garland's motive to commit a drive-by shooting and his gang affiliation. The trial court denied the motion on the merits and because it was procedurally barred due to an earlier no-merit report. *See* ***State v. Tillman***, 2005 WI App 71, ¶19, 281 Wis. 2d 157, 696 N.W.2d 574 (holding that "when a defendant's postconviction issues have been addressed by [a no-merit report], the defendant may not thereafter again raise those issues or other issues that could have been raised in the previous [no-merit report]…"). We need not decide whether Garland's motion was procedurally barred, whether his evidentiary challenges raise a constitutional issue cognizable under § 974.06 or whether he established any evidentiary error, because we conclude that the alleged errors were harmless beyond a reasonable doubt.

¶2 Garland was convicted of seven counts of first-degree recklessly endangering safety as a party to a crime, with penalty enhancers for use of a dangerous weapon and for gang crimes. He was also convicted of two counts of bail jumping because he was released on bond at the time of the shooting. The State alleged that Garland participated in the drive-by shooting at a house containing seven people, believing that Matt Ballard was in the house. The drive-by shooting occurred one week after Garland participated in a gang fight at that house between the Imperial Gangsters, the gang with which Garland associated, and the Latin Kings. In that fight, Ballard struck Garland over the head with a

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

beer bottle. The State alleged that the drive-by shooting was in retaliation for the fight and Ballard's striking Garland.

¶3 Garland first argues that the court improperly allowed Ballard to testify regarding two three-way telephone conversations between himself, Garland, and "Sasquatch," who was identified as an Imperial Gangster from Milwaukee. In those conversations, Sasquatch threatened Ballard, stating that the Imperial Gangsters would shoot him with an M-1 rifle. Garland argues that Ballard's recitation of the threat constituted "testimonial hearsay" and denied Garland his constitutional right to confront witnesses under ***Crawford v. Washington***, 541 U.S. 36, 68-69 (2004).[2]

¶4 Because the State presented overwhelming evidence of Garland's motive and his participation in the shooting, as well as his association with the Imperial Gangsters, any error in allowing testimony regarding Sasquatch's threats was harmless beyond a reasonable doubt. An evidentiary error is harmless if the evidence did not contribute to the guilty verdicts. *See* ***State v. Hale***, 2005 WI 7, ¶60, 277 Wis. 2d 593, 691 N.W.2d 637. Ballard and Chris Baremore, a self-proclaimed Latin King member, testified that the Imperial Gangsters lost the gang fight that occurred one week before the drive-by shooting and were forced out of the house. Garland, Jerald Buckley, Shawn Frye, and Shawn Townsend, all associates of the Imperial Gangsters, returned with baseball bats and made threats.

[2] The holding in ***Crawford v. Washington***, 541 U.S. 36 (2004), does not apply retroactively in a collateral attack on the conviction. *See* ***Whorton v. Bockting***, 127 S.Ct. 1173, 1177 (2007). We also question whether testimony of a threat given by the recipient of the threat constitutes hearsay under WIS. STAT. § 908.01(3). Because the threat refers to future activity rather than past or present events, it does not appear to be introduced to prove the truth of any matter asserted.

Ballard testified that Garland threatened to "wet [Ballard] up" with an M-1, gang jargon for shooting someone. Police recovered M-1 shell casings from the crime scene. Baremore testified that Garland said he made a call to Milwaukee and that Garland and people from Milwaukee were "going to wet us up." Ballard and Townsend then left the scene in a blue Neon.

¶5 Ballard testified that in the ensuing week, Garland threatened him at least ten times. During these threats, Garland again brought up the M-1 and how he was going to use it on Ballard. Hours before the shooting, Garland spoke to Ballard to find out where he would be that night, and Ballard told him he would be present at the house that later became the target of the drive-by shooting.

¶6 In the days before the shooting, several witnesses saw Garland in possession of a gun similar to the one used in the shooting. Buckley testified that on the night of the shooting he was present at Garland's residence and believed he saw Garland leave with a gun partially concealed in his baggy clothes. Garland left the house with Townsend and Tori Lee in Lee's blue Neon. After the drive-by shooting, Rosa Rivera, who was in the house during the shooting, testified that she heard Jason Ranson exclaim "it's a blue Neon. It's Tori Ann." According to Rivera, the license plate read "TORI ANN."

¶7 Buckley also testified that after the shooting, Garland, Townsend, and Lee returned to Garland's residence and Garland immediately stripped to his underwear, put his clothes in the washing machine, and took a shower. The next day Buckley was again at Garland's residence and a person from Milwaukee called "Cap G." was there with an M-1, and he threatened to kill Buckley if he ever said anything about the drive-by shooting. Two or three weeks later Garland admitted to Buckley that he committed the drive-by shooting and also threatened

Buckley. Ballard also testified that some time after the shooting Garland discussed the shooting with him at a party and Garland said "Now you know what I am about." In light of all of the evidence of Garland's participation in the shooting, his numerous other threats against Ballard, Garland's admission of his involvement and evidence of gang involvement, the challenged testimony regarding Sasquatch's telephone threats did not contribute to the guilty verdicts.

¶8 Garland also challenged the admissibility of expert testimony presented by Detective Douglas Anderson regarding the gang principle of "payback."[3] Anderson testified that gangs are required to retaliate against other gangs for wrongs committed against their members or associates or they will lose face. The longer it takes for the gang to retaliate, the more it must escalate the violence to save face. Garland argues that this testimony was not admissible as an expert opinion because it would not assist the jury in determining a fact in issue. He describes "payback" as nothing more than the common notion of revenge, already known by the jury. He describes Anderson's testimony regarding payback as a due process violation, although he does not elaborate on the alleged fundamental unfairness of telling the jury facts that are common knowledge.

¶9 Anderson's testimony regarding payback was admitted to show Garland's motive and to establish that the drive-by shooting was committed in association with gang activity. Because overwhelming evidence established

[3] In addition, Garland argues that Anderson's testimony about the gang principle of "non-cooperation" constituted an impermissible comment on the credibility of another witness, prohibited by ***State v. Haseltine***, 120 Wis. 2d 92, 96, 352 N.W.2d 673 (Ct. App. 1984) (stating that "[n]o witness, expert or otherwise, should be permitted to give an opinion that another mentally and physically competent witness is telling the truth"). All of Garland's objections to Anderson's testimony about non-cooperation were sustained. Therefore, he has no basis for pursuing that issue on appeal.

Garland's and the Imperial Gangsters' motives and participation in the shooting, Anderson's testimony regarding payback did not contribute to the verdicts.

By the Court.—Order affirmed.

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