

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

APRIL 16, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-2282-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DAMIAN DORAN,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Brown County:
RICHARD G. GREENWOOD, Judge. *Affirmed.*

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

PER CURIAM. Damian Doran appeals a judgment convicting him of physical abuse of a child and sentencing him to forty-two months in prison. The jury acquitted Doran of the criminal gang penalty enhancer. See § 939.625(1), STATS. Doran argues that: (1) the trial court erred when it failed to rule on his request for trial to the court; (2) this court should reverse in the interest of justice because the real controversy was not fully tried; (3) the trial

court impermissibly substituted its opinion for the jury's finding regarding the gang-related penalty enhancer; and (4) the court erroneously exercised its sentencing discretion when it sentenced Doran for crimes committed by others. We reject these arguments and affirm the judgment.

The child abuse charge arises out of a fist-fight between Doran and a minor. The victim, a member of a rival gang, then attempted retaliation including firing shots at a car Doran occupied. The State attempted to prove that the fist-fight was a gang-related activity. The jury found that Doran committed child abuse, rejecting a self-defense argument, but acquitted Doran of the criminal gang penalty enhancer.

Doran was not prejudiced by the trial court's failure to rule on his request for trial to the court because the court would have been compelled to deny the motion. The record does not show that the State consented to waiver of its jury trial right. Section 972.02(1), STATS., allows waiver of a jury trial "with the approval of the court and the consent of the State." The record does not establish that the State consented to waive its jury trial right.

Doran argues that the real controversy was not tried because the trial included substantial evidence regarding gang activity that occurred after the child abuse incident. That evidence was relevant because Doran was charged with criminal gang activity under § 939.625(1), STATS. The fact that the jury acquitted Doran of that penalty enhancer did not render evidence of the subsequent shooting inadmissible. The real controversy, whether Doran was acting in self-defense, was fully and fairly tried. We conclude there is no basis for discretionary reversal under § 752.35, STATS.

The trial court did not substitute its conclusion on gang-related activity for the jury's finding. The jury's acquittal on that penalty enhancer means that it had a reasonable doubt that the child abuse was committed "for the benefit of, at the direction of or in association with any criminal gang, with specific intent to promote, further or assist in any criminal conduct by criminal gang members" See § 939.625(1)(a), STATS. The jury's verdict does not constitute a finding that Doran was not a gang member or did not engage in gang-related activity. In fact, Doran admitted being a member of the Gangster Disciples, whose primary gang activities include "drug dealing, burglaries, auto

theft, batteries, threats, intimidation" In pronouncing sentence, the trial court is permitted to consider a defendant's undesirable behavior patterns as well as his personality, character and social traits. See *Triplett v. State*, 51 Wis.2d 549, 552, 187 N.W.2d 318, 320 (1971); *Waddell v. State*, 24 Wis.2d 364, 368-69, 129 N.W.2d 201, 203 (1964). Doran's gang involvement is a relevant factor in assessing his character and establishes a need to protect the community from his criminal activity.

The trial court properly exercised its sentencing discretion. The forty-two months sentence is seventy percent of the maximum term. The court specifically considered the recommendation in the presentence report, Doran's character and the need to protect the public. See *State v. Paske*, 163 Wis.2d 52, 62, 471 N.W.2d 55, 59 (1991). By considering Doran's gang involvement and the dangers created by gang activity, the trial court did not impermissibly punish Doran for crimes committed by others against him. Rather, the court appropriately considered Doran's lifestyle when assessing his character and the need to protect society.

By the Court. – Judgment affirmed.

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