COURT OF APPEALS
DECISION
DATED AND FILED

August 23, 2001

Cornelia G. Clark
Clerk of Court of Appeals

No. 00-2724-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ZONG LOR,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Judgment modified and, as modified, affirmed; order affirmed; cause remanded with directions*.

Before Dykman, Deininger and Lundsten, JJ.

¶1 PER CURIAM. Zong Lor appeals from a judgment convicting him of being a party to the crimes of first-degree reckless homicide by use of a dangerous weapon and attempted first-degree reckless injury by use of a dangerous weapon, and also from an order denying his motion for postconviction

relief. He claims that counsel performed ineffectively by stipulating that a witness was unavailable at trial and that the ensuing admission of the witness's preliminary hearing testimony was plain error. We disagree with Lor's theory of evidentiary error for the reasons discussed below. However, we modify the judgment of conviction to conform to the verdict actually rendered by the jury on the second count: party to the crime of first-degree recklessly endangering safety by use of a dangerous weapon.

BACKGROUND

¶2 Lor was charged with being a party to the crimes of first-degree intentional homicide and attempted first-degree intentional homicide, using a dangerous weapon for each offense. The charges stemmed from a drive-by shooting involving gang members. There were several people in the car from which the shots were fired, and the surviving victim was unable to identify the shooter, other than to say that he thought the shooter had shoulder-length hair. A number of witnesses testified that Lor had shorter hair, while other occupants of the car did have shoulder-length hair. However, one of the occupants of the car, Meng Vang, testified at the preliminary hearing that, at the time of the shooting, he had seen Lor's arm sticking out of the window with a gun in Lor's hand, and that Lor had said he was shooting at members of a rival street gang.

¶3 The State obtained a subpoena to compel Meng Vang's presence at trial. The subpoena was addressed to Meng's parent or guardian, and was served on Meng's father, Ma Vang. Ma Vang stated that he had shown the subpoena to his son, but that he had not seen his son for several days prior to trial and did not know how to locate him. When Meng did not appear at trial, the State requested a body attachment.

¶4 The court issued the body attachment, but Meng could not be located. The State moved to have Meng's preliminary hearing testimony admitted. Defense counsel conceded that Meng was unavailable, but objected to the admission of the preliminary hearing testimony on the ground that it was unreliable. The trial court admitted the preliminary hearing testimony.

¶5 The jury found Lor guilty of the lesser-included offense of first-degree reckless homicide on the first count and the lesser-included offense of first-degree recklessly endangering safety on the second count, both as a party to the crime, and both while using a dangerous weapon. Lor filed a postconviction motion challenging the admission of Meng's preliminary hearing testimony on the grounds that the State had failed to make a good faith effort to secure Meng's presence, and that counsel had been ineffective for conceding to Meng's unavailability, thus infringing upon Lor's constitutional right to confront the witnesses against him. The trial court denied the motion, and Lor appeals.

STANDARD OF REVIEW

¶6 Claims of ineffective assistance of counsel present mixed questions of law and fact. ***Strickland v. Washington***, 466 U.S. 668, 698 (1984). We will not set aside the circuit court's findings about counsel's actions and the reasons for them, unless they are clearly erroneous. WIS. STAT. § 805.17(2) (1999-2000);[1] ***State v. Pitsch***, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985). However, whether counsel's conduct violated the defendant's constitutional right to effective

[1] All further references to the Wisconsin Statutes are to the 1999-2000 version.

assistance is ultimately a legal determination, which this court decides *de novo*. ***Pitsch***, 124 Wis. 2d at 634.

¶7 We may independently review the record to determine whether a plain error which was not brought to the attention of the trial court affected the defendant's substantial rights. WIS. STAT. § 901.03(4); ***Virgil v. State***, 84 Wis. 2d 166, 189, 267 N.W.2d 852 (1978).

ANALYSIS

¶8 Lor's claims of ineffective assistance of counsel and plain error in the admission of Meng's testimony are both premised on the theory that Meng should not have been declared unavailable for trial. *See* WIS. STAT. § 908.045(1) (preliminary hearing testimony may be admitted as an exception to the hearsay rule if the witness later becomes unavailable). A witness may be found "unavailable" when he or she "[i]s absent from the hearing and the proponent of the declarant's statement has been unable to procure the declarant's attendance by process or other reasonable means." WIS. STAT. § 908.04(1)(e). According to the Judicial Council Committee Note of 1974, the term "reasonable means" requires due diligence, or a good faith effort, to produce the witness in accordance with prior precedent such as ***State v. La Fernier***, 44 Wis. 2d 440, 444-46, 171 N.W.2d 408 (1969) (in which a prosecutor's reliance on information conveyed in a telephone conversation with two witnesses' mother was found insufficient to show the prosecutor exerted due diligence in attempting to locate the girls). Judicial Council Committee's Note, 1974, WIS. STAT. ANN. § 908.04 (West 2000). *See also* ***La Barge v. State***, 74 Wis. 2d 327, 336-39, 246 N.W.2d 794 (1976) (in which the issuance of a subpoena and measures including extradition proceedings and an arrest warrant were found to have constituted sufficient effort).

¶9 Lor contends that the State's attempt to secure Meng's presence at trial fell short of due diligence because the subpoena was not personally served on Meng and was ambiguous as to whose presence was actually required at trial. We are satisfied, however, that the State exerted a good faith effort. First, WIS. STAT. § 885.03 specifically authorizes substituted service of a subpoena at the home of a witness. Secondly, the subpoena identified the witness who was to appear by his birth date. Given Meng's prior preliminary hearing testimony, there could be no genuine misunderstanding as to whose presence was being required by the subpoena. In addition, the State contacted Meng personally a week before trial to remind him that he needed to be in court, and was told by Meng that he would probably come with his parents. When Meng failed to show up on the first day of trial, the State obtained a body attachment. Because the State used reasonable means at its disposal to obtain Meng's presence in court, we conclude that counsel did not perform deficiently by conceding that Meng was unavailable, and the trial court did not commit plain error by admitting Meng's preliminary hearing testimony.

¶10 We note, however, that there is a clerical error on the judgment of conviction. Upon remittitur, the clerk of the circuit court should enter an amended judgment of conviction showing that Lor was convicted on count two of the Class D felony of being a party to the crime of first-degree recklessly endangering safety by use of a dangerous weapon, contrary to WIS. STAT. § 941.30(1), rather than the Class C felony of attempted first-degree reckless injury.

By the Court.—Judgment modified and, as modified, affirmed; order affirmed; cause remanded with directions.

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