

No. 1-09-0482

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,) Appeal from
) the Circuit Court
Plaintiff-Appellee,) of Cook County
)
v.) No. 06 CR 21872
)
JAVARRO SMITH,) Honorable
) Michael Brown,
Defendant-Appellant.) Judge Presiding.

JUSTICE CAHILL delivered the judgment of the court.
Presiding Justice Garcia and Justice Robert E. Gordon concurred in the judgment.

ORDER

Held: The introduction of gang-related evidence was not error. Defendant's conviction for first degree murder was affirmed.

Following a jury trial, defendant Javarro Smith was found guilty of the first degree murder of Lance Waters (the victim) and sentenced to 58 years in prison. On appeal, he contends that the trial court erroneously allowed the State to introduce gang-related evidence despite the State's failure to sufficiently prove the murder was related to gang activity. We affirm.

Before trial, the State made a motion *in limine* to allow the jury to hear evidence that defendant and the victim were in rival gangs and there was a general rivalry between the two gangs. In denying the State's motion, the trial court said:

“There could be some probative value to belonging to two different organizations.

* * *

On the other hand, I do find that it would be prejudicial to the defendant to introduce gang evidence without a stronger connection as to [insight] as to the defendant's motivation.

* * *

If for some reason that turns out to be an issue that the defense raises, I won't preclude [] you [from] that.”

During the State's opening statement, the prosecutor told the jury that the victim's life was taken for “no reason other than gang conflict” or “gang nonsense.” Defendant did not object.

The State called Quenton Davis. Davis testified that he was a member of the southside faction of the Black P Stones (BPS) gang and the victim was a member of the Four Corner Hustlers, part of the Vice Lords. Davis said the BPS and the Vice Lords did not get along and there was “a big difference” between the northside and southside BPS.

In the early morning hours of October 2, 2005, Davis was hanging out with the victim, the victim's girlfriend Kandice and another person named Bishop in front of 5411 N. Winthrop

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Avenue in Chicago. Davis heard the victim ask, “who the [expletive deleted] is this, Joe?”

When Davis looked up he saw a person approaching the group, wearing black clothes and a dark brown hooded sweatshirt. The hood was pulled up over the person’s head. From about eight feet away, Davis saw the person’s face and recognized him as defendant because Davis had known defendant for about 10 years. He saw defendant pull out a handgun from his back and fire one shot at the victim.

Later that day, Davis identified defendant from a photo array as the shooter. On August 22, 2006, Davis also identified defendant as the gunman in a lineup.

On cross-examination, Davis said he had drunk two “fifths” of brandy and smoked two bags of marijuana that night but was not drunk or high at the time of the shooting. Right before the shooting, he was selling cocaine and “counting his money.” Defense counsel asked Davis, “you just didn’t like the sect of the gang that Javarro belonged to?” Davis responded, “I didn’t say that either.”

Richard Landgraff, a detective with the Chicago Police Department, testified that he recovered a .45-caliber cartridge case at the scene of the shooting.

Nikki Shelby testified that William Shelton, Kekoa Christian and defendant were members of the northside faction of the BPS. In the early hours of October 2, 2005, Shelton drove to Shelby’s home with “other persons” in his car, but Shelby could not see who they were. Shelton gave Shelby a plastic bag and returned to retrieve it later that evening.

Kekoa Christian testified that he and Shelton were members of the BPS. Christian was with Shelton and defendant during the early morning hours of October 2, 2005. He got into

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Shelton's car with defendant and drove to "some girl's house" on the west side. He did not see defendant with a weapon or hear defendant make statements about a shooting.

Christian admitted giving a written statement to the police and acknowledged that he testified before the grand jury. He denied making the statements contained in the written statement or answering questions before the grand jury implicating defendant.

Assistant State's Attorney Nancy Galassini testified that she took a written statement from Christian on August 1, 2006. According to the statement, in the early hours of October 2, 2005, Christian met Shelton by his car near Kenmore and Balmoral Avenues. A short time later, defendant ran down Balmoral Avenue from the direction of Winthrop Avenue, wearing a black hooded sweatshirt with the hood covering his head. Defendant, Christian and Shelton got into the car and Shelton drove to Nikki Shelby's house on the west side. On the way to Shelby's house, Christian saw defendant "playing" with a .45-caliber handgun, which was sold to Shelton by Christian. At Shelby's house, defendant demonstrated how he "walked up" on a "dude or hook" and shot him in the chest. Christian told Galassini that "hook" is a disrespectful term for a member of the Vice Lords, a rival gang. Defendant said he tried to shoot at the crowd but the gun jammed. Christian said he believed defendant did it as "gang banging stuff."

William Shelton testified that he, Davis and defendant were members of the BPS. He saw defendant and Christian in the morning hours of October 2, 2005, but did not recall the shooting. Shelton admitted giving a written statement on August 4, 2006, and testifying before the grand jury. The testimony before the grand jury was consistent with his written statement. According to that testimony, Christian and defendant were in Shelton's car in the early morning

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hours of October 2, 2005. Defendant said that he needed to hide a gun and exited Shelton's car at Balmoral and Kenmore Avenues. Shelton remained in his car and heard a single gun shot. A few seconds later, defendant returned to the car and Shelton drove to Nikki Shelby's house on West Potomac. When they arrived, Shelton handed Shelby the gun "wrapped in something."

The next evening, Shelton was with Christian and defendant at Shelton's house. Defendant said he "shot dude in the neck" and believed that "dude" thought he was a "cluck," meaning a rival gang member. Defendant also believed Davis had seen his face.

On cross-examination, Shelton said he testified before the grand jury because the "police cut [him] a deal" after he was arrested in 2008 for drug possession. He also said that he was high on cocaine when the written statement was taken but was "probably coming down" before the grand jury proceeding. Defense counsel asked Shelton, "so you feel no loyalty to even a fellow gang member if he's from a different block than yours?" Shelton responded, "[w]e ain't the same really."

Dennis Pedretti testified that at the time of the shooting, he was working as a security guard in front of 5411 N. Winthrop Avenue. Pedretti was sitting in his car when he saw a group of three black males and one black female in front of the building. A short time later, a man came from Balmoral Avenue, walked by Pedretti's car and headed north on Winthrop Avenue. The man was wearing a black hooded sweatshirt with the hood pulled up over his head. The man walked up to someone in the group in front of 5411 N. Winthrop Avenue, pulled out a gun and shot him. From about 20 feet away, Pedretti saw that the gun was a black semi-automatic pistol. After the shooting, the gunman walked south past Pedretti's car toward Balmoral Avenue.

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Pedretti caught a glimpse of the man's face but could only tell that the gunman was dark skinned.

Padretti ran to a nearby pay phone and called the police.

Assistant State's Attorney Tracy Senica testified that she was assigned to bring Kekoa Christian to the grand jury on August 1, 2006. She said Christian's testimony before the grand jury was consistent with Christian's written statement.

The parties stipulated that Dr. Michelle Humelia would testify that the victim died of a single gun shot to the chest and the manner of death was homicide.

No other evidence was presented. During the State's closing argument, the State referred to the gang evidence:

[T]his is Lance Waters after the defendant shot him from two feet away over gang banging nonsense.

* * *

And yes, Lance Waters was a member of a gang. He was a Four Corner Hustler, which is part of the Vice Lords.

Quentin Davis told you that he was a member of a gang, that he was Black P. Stone.

* * *

Think about what courage it took for Quentin Davis to walk up these two steps here, get on the witness stand and point out a member of the same gang as the man who shot and killed his friend.

* * *

The defendant wasn't there when his fellow gang members were giving him up.”

During closing arguments, defense counsel said that Davis was biased because he and defendant were in different factions of the BPS.

On rebuttal, the State told the jury that “gangs are built on the notion of intimidation and violence.” Defendant objected to the gang-related evidence for the first time. The trial court instructed the jury that “closing arguments are to be confined to the evidence and to the reasonable inferences to be drawn from the evidence.”

The jury found defendant guilty of first degree murder, and defendant was sentenced to 58 years in prison.

On appeal, defendant contends that the trial court erroneously allowed the State to introduce gang-related evidence despite the State's failure to sufficiently prove the crime charged was related to gang activity.

We first note that the parties disagree as to whether the alleged error was preserved. Defendant contends that the issue was properly preserved because it was litigated and ruled on both at the pretrial hearing and in his posttrial motion. The State contends that defendant has forfeited review of the issue because he raised it as a means of challenging witness credibility and did not object during trial to the State's reference.

We have recently held that an issue is preserved for review where a defendant raises it in his reply to the State's motion *in limine* and in his posttrial motion, despite the defendant's failure to object during trial. *People v. Maldonado*, 398 Ill. App. 3d 401, 415, 922 N.E.2d 1211 (2010).

Here, the issue was preserved where defendant objected to the admission of the gang evidence in his reply to the State's motion *in limine* and in his posttrial motion.

Turning to the merits of the case, defendant contends that the gang evidence in this case has little or no probative value because the State only presented evidence of motive in the abstract. The State responds that the gang evidence was used to establish a motive for the murder and explain an otherwise inexplicable act.

Evidentiary rulings regarding the admission of gang-related evidence are reviewed for an abuse of discretion. *People v. Johnson*, 208 Ill. 2d 53, 102, 803 N.E.2d 405 (2004).

The State's initial noncompliance with a motion *in limine* does not necessarily constitute reversible error. *People v. Ward*, 371 Ill. App. 3d 382, 424, 862 N.E.2d (2007) ("while a party's willfully ignoring a ruling on a motion *in limine* may very well be deserving of sanction by the trial court, it does not necessarily follow that such action constitutes reversible error on appeal").

Gang-related evidence is admissible if it is relevant to an issue in dispute and its probative value is not substantially outweighed by its prejudicial effect. *People v. Gonzalez*, 142 Ill. 2d 481, 489, 568 N.E.2d 864 (1991). "Such evidence is admissible to show common purpose or design, or to provide a motive for an otherwise inexplicable act." *People v. Williams*, 262 Ill. App. 3d 808, 819, 635 N.E.2d 653 (1994) (citing *People v. Smith*, 141 Ill. 2d 40, 58, 565 N.E.2d 900 (1990)).

Here, the trial court initially ruled before trial against admitting the gang evidence, unless "it turn[ed] out to be an issue that the defense [raises]." As the trial developed, the gang evidence became relevant to explain the use of the terms "hook" and "cluck," disrespectful terms

for rival gang members. Defendant told Christian how he “walked up” on a “hook or dude” and shot him, and told Shelton he “shot dude in the neck” and believed that “dude” thought he was a “cluck.” Defendant’s use of these pejorative terms evidences his knowledge of the victim’s gang membership before the shooting. Absent other evidence showing an earlier relationship between defendant and the victim, the gang evidence was relevant to establish a motive and explain an otherwise explicable act. *Williams*, 262 Ill. App. 3d at 819.

Defendant cites *People v. Negron*, 297 Ill. App. 3d 519, 697 N.E.2d 329 (1998), for the proposition that the gang evidence was irrelevant. *Negron* is distinguishable because the issue there was whether gang evidence of an earlier killing was admissible. The court held that the evidence was irrelevant because the State failed to show the defendant’s knowledge of the earlier murder but found the error harmless because the jury still could have found a motive from other gang evidence. *Negron*, 297 Ill. App. 3d at 534-35. Here, the gang evidence is relevant because it shows defendant knew of the victim’s gang membership before the shooting.

Defendant also contends he was prejudiced by the admission of the gang evidence and the error was not harmless because the evidence was not overwhelming. Defendant argues that the evidence was closely balanced because the State’s witnesses were not credible. The State responds that the evidence was overwhelming where Davis saw defendant shoot the victim, Davis identified defendant from a photo array and at two separate lineups, Shelton and Christian testified that defendant admitted to the shooting and the jury returned a verdict in less than two hours.

We believe the admission of the gang evidence was not reversible error because its

probative value was not substantially outweighed by its prejudicial effect. See *Gonzalez*, 142 Ill. 2d at 489. Any prejudicial effect from the evidence of defendant's gang affiliation was minimized by the fact that the victim was a member of a rival gang and Davis, Shelton and Christian were members of the same gang as defendant. See *People v. Furdge*, 332 Ill. App. 3d 1019, 1025, 774 N.E.2d 415 (2002) ("any prejudicial effect from the fact that [the defendant] was a Black Disciple gang member was minimized by the fact that [the victim] also admitted he was a member of the rival Gangster Disciples"). Defense counsel also questioned the witnesses and defendant about their gang affiliations, relied on the gang evidence to attack the witnesses' credibility and failed to object throughout trial. *People v. Mays*, 23 Ill. 2d 520, 525-26, 179 N.E.2d 654 (1962) (a defendant "may not sit idly by and allow alleged irregular proceedings to occur without objection, and afterward seek to reverse his conviction by reason of those same irregularities"). We also note that defense counsel was the first person to mention defendant's gang membership at trial. We agree with the State that defendant cannot now argue the State erred in referring to gang evidence where defendant attempted to utilize the gang evidence to his own advantage.

Finally, defendant contends that the alleged error was greatly exacerbated by the State's opening statement and closing argument to the jury.

The State is permitted to make reasonable inferences from expected evidence during opening statements and is given wide latitude in closing argument. *People v. Cloutier*, 156 Ill. 2d 483, 507, 622 N.E.2d 774 (1993). During closing argument, the State may comment on the evidence, draw reasonable inferences from it and "also respond to comments by defense counsel

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which clearly invite a response.” *People v. Hudson*, 157 Ill. 2d 401, 441, 626 N.E.2d 161 (1993).

The State’s statement that the victim was killed for no reason but “gang conflict” was a reasonable inference based on Shelton's and Christian’s testimony that defendant said he shot a “dude or hook” when he believed that the victim thought he was a “cluck.” The State’s closing argument about defendant’s and the victim’s gang membership was a comment on the evidence adduced at trial.

Defendant’s closing argument also used the gang evidence to attack the witnesses’ credibility:

“[Davis] talked about this north side, south side conflict. North side gang bangers don’t have the same honor that the south side has. He has interest, bias, and a reason to lie.”

During rebuttal, the State responded:

“But lets dispel this notion, by the way, that it was easy for (Davis) to get up here and point out another Black P Stones as a murderer, this notion that because they are from the north side or the south side. *** Gangs are built on the notion of intimidation and violence.”

The first time defendant objected to the gang-related evidence at trial was after this last comment. The trial court instructed the jury that “closing arguments are to be confined to the evidence and to the reasonable inferences to be drawn from the evidence” and to disregard “any statement or argument which is not based on the evidence or reasonable inferences to be drawn from the evidence.”

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Even assuming part of the State's closing argument was improper, the trial court cured the alleged errors by admonishing the jury and sustaining defendant's objections. See *People v. Simms*, 192 Ill. 2d 348, 396-97, 736 N.E.2d 1092 (2000) (citing *People v. Kidd*, 175 Ill.2d 1, 51, 675 N.E.2d 910 (1996)).

Defendant has failed to show the introduction of the gang evidence was reversible error. The judgment of the circuit court is affirmed.

Affirmed.