

No. 1-10-2054

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 08 CR 3175
	)	
JOSE BAHENA,	)	Honorable
	)	Maura Slattery-Boyle,
Defendant-Appellant.	)	Judge Presiding.

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PRESIDING JUSTICE HOFFMAN delivered the judgment of the court.  
Justices Hall and Karnezis concurred in the judgment.

**ORDER**

- ¶ 1 *Held:* The trial court did not commit reversible error by refusing to allow the defendant to present evidence as to the violent character of a participant in an encounter that led to his shooting the victim.
- ¶ 2 Following a jury trial, defendant Jose Bahena was convicted of first degree murder in the shooting death of Juan Lebron. Defendant was sentenced to 45 years in prison, which included a 25-year enhancement for personally discharging a firearm. On appeal, defendant contends the trial court erred in denying the defense's motion to admit evidence of the violent character of Jason Brock, with whom defendant exchanged words shortly before the shooting, pursuant to

*People v. Lynch*, 104 Ill. 2d 194 (1984). Defendant also asks that the mittimus be corrected to reflect one conviction for first degree murder. We modify the mittimus but affirm the trial court's judgment in all other respects.

¶ 3 Defendant fatally shot Lebron in a liquor store in the early morning hours of January 8, 2008, during an argument that involved defendant, as well as Lebron, Brock and Omar Davila, three members of a gang opposed to that of defendant. Before defendant's trial, the State filed a motion *in limine* seeking to bar the defense from presenting evidence "as to the characters of Lebron and Brock" to support the theory that defendant shot Lebron in self-defense. The motion *in limine* followed defendant's answer to discovery that indicated he would present a self-defense theory and listed several potential witnesses. At the motion hearing, the State alleged one individual listed was a victim of a crime at which Lebron acted as a lookout, and the remaining four listed individuals were victims of robberies committed by Brock.

¶ 4 The State asserted that *Lynch* material was inadmissible in this case because the liquor store's video recording of the crime established that defendant was the initial aggressor, as the only person at the scene with a gun. The State further argued Lebron did not threaten or point a gun at defendant and that Brock was a witness to the shooting and not the victim of defendant's gunfire. Defendant's counsel responded that the entire group that included Lebron and Brock constituted the aggressor in this case.

¶ 5 At the next court date, the court stated it had viewed the video recording and "did not see any indication" that Lebron was the aggressor. Noting that for evidence pertaining to Lebron's background to be allowed pursuant to *Lynch*, Lebron must be the initial aggressor, the court stated Lebron "was actually trying to prevent further escalation" by standing between defendant and Brock. The court also ruled that such evidence was not admissible against Brock, relying on *People v. Bridges*, 188 Ill. App. 3d 155 (1989), which noted that the predicate to admission of

*Lynch* evidence is that the party is the victim, unlike Brock. The court granted the State's motion *in limine*, ruling that evidence of prior violent acts by Lebron or Brock would not be admitted.

¶ 6 At trial, the State presented the testimony of various witnesses establishing that Lebron, Brock and Omar Davila went to a liquor store near the intersection of Montrose and Kedzie in Chicago. Shortly after they entered the store, two youths emerged from a back room and asked what gang they belonged to, and Lebron responded they were Folks. Davila testified he recognized the two youths as members of the LaFamilia Stones gang, which are People, or the enemies of Folks. A male later identified as Oscar Alvarez was sitting on the store's counter and left the store after hearing the conversation.

¶ 7 Davila testified Lebron and Brock had liquor bottles in their hands, and one of the Folks also held a bottle. He stated that as the store clerk tried to "calm everybody down," Davila went to a corner of the store, at which point more people entered.

¶ 8 Davila said he, Lebron and Brock then stood together at the back of the store "waiting for whatever was going to happen." Alvarez, who had earlier left the store, returned with defendant and other members of the LaFamilia Stones.

¶ 9 Upon entering the store, defendant fired a gun, fatally striking Lebron. Davila testified it "just happened quick" and that he tried to "run for cover" after the shot. Lebron fell to the ground upon being shot. According to Davila, neither Lebron nor Brock were carrying weapons. On cross-examination, Davila said he and Brock belonged to a gang that was part of the Folks nation. He met Lebron the day before the shooting. A medical examiner testified that Lebron sustained five gunshot wounds.

¶ 10 Saleh Abdulla, a clerk in the liquor store, testified that defendant's group was leaving the store until, in response to the name-calling, defendant "came back," pulled out a gun and fired.

1-10-2054

Abdulla did not see anyone else inside the store holding a weapon. The jury viewed the video footage of the shooting during Abdulla's testimony.

¶ 11 Rigoberto Camacho testified he and a group of friends stopped at the liquor store that night and he spoke to defendant, who was his friend, in the parking lot. Alvarez, another friend, came out of the store and said "some guys" were "trying to get Ramiro," who was their friend. Defendant and Camacho went into the store, where an argument was taking place between Ramiro and a person Camacho later identified as Brock. Lebron and Davila were standing near Brock. Camacho testified that Ramiro and Brock were "going at it," and then Brock was "going at it with everybody," and he then was "going at it" with defendant. Brock uttered a profanity and referred to defendant's group as "Stone killers."

¶ 12 Camacho testified Brock used his cell phone to call someone and tell them to bring a "thumper," or a gun. Lebron stepped between Brock and defendant to separate them as they argued. Camacho stated that Brock took off his coat "trying to go at it." Camacho said he thought Brock was "trying to reach for something," at which point defendant raised his arm and fired a gun. On cross-examination, Camacho said the situation escalated quickly. Immediately before the shooting, Brock gestured toward his waist and held a bottle in his hand.

¶ 13 Brock also testified for the State. Prior to his testimony, he acknowledged his prior convictions for armed robbery, possession of a stolen motor vehicle and being an armed habitual criminal between 2000 and 2008. Brock testified he and Lebron were friends and went inside the liquor store with Davila. Two youths came from the store's back room, and one bumped into Lebron and asked what gang they were in. Brock told the man he was a Simon City Royal.

¶ 14 Brock testified that a person near the front of the store went outside and returned with a group that included defendant. The group spoke with the two people who had conversed with Brock. Brock said he called a friend on his cell phone because "I felt like we was trapped [in the

rear of the store], like it was going to be a problem," meaning an altercation. Brock acknowledged he asked his friend to bring a gun because he himself was not carrying a gun.

¶ 15 Brock testified the person who bumped Lebron approached them again and Lebron was "pretty much trying to be the peacemaker." However, Brock was yelling "FSK" at the group, which stood for "LaFamilia Stone Killer." Lebron was pushing Brock away from the group and telling Brock to "leave him alone." A member of defendant's group asked Lebron what he was, and Lebron responded he was a Latin Jiver and was not from the area.

¶ 16 Brock stated that the member of defendant's group who asked about Lebron's affiliation, after hearing the answer, spoke to defendant. According to Brock, defendant "stood there looking around kind of looking like he didn't know what to do." After the person spoke to defendant again, defendant approached Lebron. Brock said Lebron tried to stand in front of him and between him and defendant. Defendant fired two shots after Lebron pushed defendant. After defendant began firing, Brock and Lebron backed up in to the coolers at the rear of the store, and defendant "proceeded to keep on firing."

¶ 17 On cross-examination, defense counsel asked Brock if he was familiar with guns, referencing his armed robbery conviction at age 14. At the State's request, a discussion was held outside the presence of the jury and the witness. The court noted its earlier ruling that evidence as to Brock's propensity for violence would not be admitted; however, defense counsel asserted that although he was prevented from calling witnesses to provide such testimony, he was not barred from asking Brock, who was already on the witness stand, about his criminal record and his familiarity with weapons. The court held that Brock's prior convictions were admissible but that no further testimony on that topic could be elicited.

¶ 18 Cross-examination of Brock resumed, and he acknowledged he was a member of the Simon City Royals gang since age 15; before that, he had been a LaFamilia Stone. Brock

1-10-2054

conceded his hatred for his former gang and said Lebron's gang also hated the Stones. Brock stated he smoked marijuana and drank alcohol before going to the liquor store.

¶ 19 Brock viewed the video recording while being questioned by defense counsel; he also viewed the recording prior to trial and stated it was an accurate depiction of the events. Brock said when defendant's group entered the store, he recognized the youths as belonging to a rival gang, and he picked up a bottle from a shelf to start a fight. Brock acknowledged that he called a friend and said "get a thumper," meaning a gun. Defendant was the only person with a gun inside the store. The State presented forensic testimony that defendant fired a weapon.

¶ 20 After the State rested, defendant testified he had been a LaFamilia Stone for a few years and carried a gun that day because he had been shot in 2005. Inside the liquor store, defendant observed one of the three youths in the back of the store saying "Stone killer" and threatening to kill them. Defendant said Brock had a "black item" in his hand and the other two held bottles. Defendant heard Brock speak on his phone and request a gun. After Brock ended his phone call, he reached toward his waist.

¶ 21 Defendant testified that Brock and Lebron approached him and that Brock was "confrontational." Brock reached toward his waist for what defendant thought was a gun, and Lebron "pushed [defendant] back." Defendant said he took out his gun and started shooting because he feared that he was going to get shot. On cross-examination, defendant conceded he was the only person in the store with a gun and that he fired five shots while standing near the front door.

¶ 22 At the close of evidence, the jury was instructed on first degree murder, second degree murder and self-defense. The jury also was instructed that the State alleged defendant personally discharged a firearm during the commission of the offense that proximately caused the death of

another person. No jury instruction on transferred intent was requested or given. Among other exhibits, the jury received the entire DVD of the shooting.

¶ 23 The jury found defendant guilty of first degree murder and found that defendant personally discharged a firearm in the commission of the offense that proximately caused another person's death. The court sentenced defendant to 20 years for the murder and an additional 25 years for the discharge of a firearm, for a total sentence of 45 years.

¶ 24 On appeal, defendant contends his conviction should be vacated and his case remanded for a new trial because the trial court erred in barring the testimony of the victims of Brock's prior crimes as evidence of Brock's violent character. Defendant asserts that evidence was relevant to whether he had reason to fear for his life or act in self-defense.

¶ 25 Before reaching the merits of defendant's argument, we address the proper standard of review. Defendant argues the trial court's ruling should be reviewed *de novo* because he was barred from presenting evidence to support his theory of defense. Although questions of law are reviewed without deference to the trial court, that is not the proper standard here, where our task is to review the relevance and admissibility of evidence, which is the province of the trial court. See *People v. Figueroa*, 381 Ill. App. 3d 828, 841 (2008), citing *People v. Morgan*, 197 Ill. 2d 404, 456 (2001). The trial court may reject evidence, even if relevant, if such evidence is also remote, uncertain or speculative, and the court's rulings on that topic will not be reversed absent a clear abuse of discretion. *Figueroa*, 381 Ill. App. 3d at 841.

¶ 26 Defendant contends on appeal that he fired his gun at a "group of rival gang members" because he thought Brock was about to display a weapon. As shown by the facts set out above, although Brock was involved in the argument that preceded the shooting, defendant's shots struck and killed Lebron. At issue, therefore, is whether the evidence of the aggressive and violent

character of Brock, who was not the victim of defendant's act, should have been admitted to support defendant's claim that he acted in self-defense.

¶ 27 In the case at bar, even presuming the evidence of Brock's violent tendencies should have been admitted, any error in the exclusion of such evidence was harmless. The exclusion of admissible evidence will not result in reversal of a conviction unless the evidence reasonably could have affected the verdict. *People v. Sipp*, 378 Ill. App. 3d 157, 171 (2007). Even if defendant had been allowed to present testimony from the victims of Brock's armed robbery, that evidence likely would not have resulted in a finding that Brock was the aggressor. The video footage of the shooting, which we viewed on appeal, demonstrated that defendant moved toward Brock as they argued, and defendant shot several times, striking Lebron, who stood between defendant and Brock. Defendant was the only person in the situation who had a weapon. Further, Brock himself admitted that he had called for a gun during the encounter. Thus, to the extent defendant argues that his proposed evidence would have helped to establish that he perceived a threat from Brock's seeking a gun, we note that the jury was able to consider that evidence in any event. For these reasons, we conclude that evidence as to Brock's prior crimes could not reasonably have affected the verdict. See *Conley*, 306 Ill. App. 3d at 7 (even assuming the trial court should have instructed the jury to apply the doctrine of transferred intent to shift the defendant's self-defense belief to the two unintended victims, no prejudice resulted because the jury rejected the defendant's self-defense theory).

¶ 28 Defendant's remaining contention on appeal is that the mittimus in this case erroneously reflects two convictions of first degree murder and two sentences. As the State correctly concedes, under the one-act, one-crime rule, only one murder conviction can stand where one person has been killed. See *People v. King*, 66 Ill. 2d 551, 566 (1977) (multiple convictions prohibited when carved from same physical act); see also *People v. Lee*, 2012 IL App (1st)



1-10-2054

101851, ¶ 50. Accordingly, we correct the mittimus to reflect one conviction for first degree murder and one 45-year sentence. The judgment of the trial court is otherwise affirmed.

¶ 29 Affirmed; mittimus corrected.