

2014 IL App (2d) 121079-U
No. 2-12-1079
Order filed September 26, 2014
Modified upon denial of rehearing February 23, 2015

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court of Kane County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 10-CF-590
)	
JUAN MACEDO, JR.,)	Honorable
)	Allen M. Anderson,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Justices Jorgensen and Hudson concurred in the judgment.

**ORDER
MODIFIED UPON DENIAL OF REHEARING**

- ¶ 1 *Held:* The trial court did not abuse its discretion when it admitted gang-related evidence and the prosecution did not engage in prosecutorial overkill when it introduced evidence of the culture and crimes of local gangs. We direct the circuit clerk to amend the trial court order to reflect a credit of 881 days against defendant's sentence. We remand to the trial court for a hearing on whether defendant's crimes were sexually motivated.
- ¶ 2 Following a jury trial, defendant, Juan Macedo, Jr., appeals his conviction of three counts of attempted murder while armed with a handgun (720 ILCS 5/8-4(a) (West 2010)), one count of

armed violence (720 ILCS 5/33A-2(a) (West 2010)), and one count of aggravated discharge of a firearm (720 ILCS 5/24-1.2(a)(2) (West 2010)). Defendant contends that (1) he was denied a fair trial because the trial court allowed the introduction of unfairly prejudicial gang-related evidence and, in doing so, the State engaged in prosecutorial overkill; (2) his mittimus should be amended to reflect a credit against his sentence for time spent in presentence custody; and (3) he should be required to register under the Violent Offenders Against Youth Registration Act (VOYRA) rather than the Sex Offender Registration Act (SORA). We affirm in part, and remand to amend the mittimus and to determine whether defendant's crimes were sexually motivated for purposes of proper registration.

¶ 3 On March 31, 2010, defendant was charged by indictment with three counts of attempted murder while armed with a handgun, one count of armed violence, and one count of aggravated discharge of a firearm. The State proceeded against defendant on a theory of accountability because it was undisputed that Carlos Berrum, a passenger in defendant's vehicle, was the individual that fired multiple shots into the car occupied by the victims.

¶ 4 On September 16, 2011, prior to trial, the State moved for a motion *in limine* to allow the admission of gang-related evidence, including defendant's gang affiliation through the testimony of Detective Tom Wolek or Detective Rick Demierre. The State, citing *People v. Cruzado*, 299 Ill. App. 3d 131, 141 (1998), noted that three factors should be considered when determining whether to allow evidence of gang activity through police testimony: (1) whether an officer's testimony qualifies as an expert opinion; (2) whether the testimony was relevant and; (3) whether the prejudicial effect of the testimony was outweighed by its probative value. The State argued that either officers' testimony would qualify as an expert opinion and that the relationship between various Elgin street gangs was knowledge "that would be beyond the common juror and

the testimony of an expert would help in reaching their verdict.” The State further argued the gang-related evidence was relevant to show defendant’s motive. Specifically, the State asserted that one of the victims believed that the shooting occurred because he used to “hang out with the Kings or because his brother was a Maniac.” The State cited *People v. Smith*, 141 Ill. 2d 40, 58 (1990), for the proposition that evidence indicating that a defendant was involved in gang activity was admissible to provide a motive for an otherwise inexplicable act. The State further argued that the probative value of the evidence outweighed its prejudicial effect.

¶ 5 Defendant objected, arguing that the trial court should not rule on the motion without having further information. Specifically, defendant asserted that “the court needs to hear pretrial what type of evidence is proposed to be admitted and it’s not just a blanket ruling allowing the prosecution to seek to admit whatever type of evidence it sees fit.” In response, the trial court questioned the State with regard to the scope of the evidence and ascertained that the officer’s testimony would be used to show a motive for the shooting.

¶ 6 On September 23, 2011, the trial court granted the State’s motion *in limine*. The trial court stated that it would allow the testimony to show motive. Specifically, the trial court stated that a potential motive for the shooting:

“seems to be, one, something an expert could testify about outside *** the knowledge of a juror, an ordinary civilian, lay person so to speak. Secondly, it would be relevant if it is information that explains the relationship between the people in two different cars, the reasons perhaps for shooting. It is an explanation that the jury would then be free to reject or accept as the case may be. And I don’t find it overly prejudicial. The reason I don’t think it would be prejudicial is my intention is that on *voir dire* we will make sure

we question prospective jurors on just general gang information. Would they be able to decide a case if they hear evidence of gang membership by anybody.”

The trial court further stated, “I think [the proposed testimony] meets the *Cruzado* intention.”

¶ 7 In granting the motion, the trial court also limited the scope of the proposed testimony, ruling that the State would need to avoid eliciting testimony regarding the consequences of gangs in communities and the effects that gangs may have upon the general population. Defendant asserted its position that the trial court’s limits might be overbroad and allow the State “lots of leeway” to elicit otherwise irrelevant information with respect to gang activity. The trial court clarified that, for the State to present its theory of the case, it was necessary for the expert witness to be allowed to testify regarding gang affiliations, rivalry between gangs, gang structures, and enforcement, but assured defendant that the testimony would be limited to what was needed to offer the State’s theory of the case.

¶ 8 During *voir dire*, the trial court asked the prospective jurors if they would be able to be fair and impartial despite expected evidence regarding gang affiliation and possible gang activities. The trial court asked the prospective jurors to bring it to the trial court’s attention if they could not be fair and impartial under the circumstances. No prospective juror indicated that he or she would be unable to be fair and impartial.

¶ 9 On October 17, 2011, defendant’s jury trial commenced. Undisputed testimony from the victims and witnesses reflected that the victims, Martin Cortez, Reggie Cortez, and B.C., Martin’s minor son, were followed by defendant’s vehicle while Berrum was in the passenger seat. The testimony reflected that defendant was weaving through traffic to catch up to the victims’ vehicle. Defendant’s vehicle caught up with the victims’ vehicle and pulled up next to it at a red light. Martin testified that Berrum stated, “What’s up now,” and proceeded to pull out

a gun and pointed it in Martin's direction. Martin testified that he heard the gun jam as Berrum attempted to fire it. Martin sped away and pulled over in a nearby parking lot. In the parking lot, Martin and Reggie exited their vehicle and yelled out to defendant and Berrum that B.C. was in their car. Defendant's vehicle proceeded to drive away and Martin, thinking the encounter was over, proceeded on his way.

¶ 10 Martin testified that, soon after, he noticed defendant's vehicle in front of his vehicle. Defendant proceeded to brake and then put his vehicle in reverse, causing the two cars to collide. Berrum then fired several shots through Martin's windshield. As Martin attempted to pull away, Berrum fired more shots at Martin's vehicle. Martin returned to his home and called 911. Martin's testimony was corroborated by Reggie and two other witnesses. Martin and Reggie both testified that they had prior gang affiliations and that defendant and Berrum used to affiliate with a rival gang.

¶ 11 Rick Demierre, a detective with the Gang Crimes Unit, testified for the State. He offered a description of the culture of Elgin street gangs. Specifically, Demierre testified that, over the course of his 10-year career, he investigated many gang-related offenses. He testified that the investigations entailed "graffiti, narcotics, weapons, shootings, murders, attempt[ed] murder, aggravated batteries." After cross-examination, the State requested that Demierre be tendered as an expert witness. Over defense objection, the trial court certified Demierre as an expert witness in gangs, gang membership, and gang identification.

¶ 12 Demierre further testified that he classified members of gangs by using a list of criteria that included self-admission, an arrest in the presence of a known gang member, the exhibition of gang colors, confidential informants, and being arrested for a criminal offense involving gangs. He testified that defendant and Berrum were known to him and affiliated with the Latin

Kings gang. He testified that he knew defendant to be affiliated with a gang based on prior contacts with him. He testified that Martin was affiliated with a rival gang, the Maniac Latin Disciples. He testified that Reggie had switched gang membership; he was formerly a Latin King and had become a Maniac Latin Disciple. He further testified that punishment existed for switching or leaving a gang and that this punishment could include murdering the abandoning gang member.

¶ 13 After closing arguments and jury deliberations, the jury found defendant guilty of all five counts charged. The trial court sentenced him to a total of 28 years' imprisonment. Defendant filed a timely motion for judgment notwithstanding the verdict, arguing among other things, that the trial court erred when it allowed the introduction of gang-related testimony. On July 3, 2012, the trial denied defendant's motion for judgment notwithstanding the verdict. Defendant timely appealed.

¶ 14 Defendant's first contention is that he was denied a fair trial by the introduction of "unfairly prejudicial gang-related evidence because the State failed to show that the shooting was gang-related and that, even if this shooting was gang-related, and even if some gang evidence was properly admitted, the State engaged in prosecutorial overkill with the introduction of irrelevant details which suggested that [defendant] had been involved in other violent and illegal acts for which he was not on trial." Specifically, defendant takes issue with the trial court's decision to allow Demierre to testify regarding Elgin-area gang involvement in crimes like graffiti, narcotics, weapons, shootings, murders, attempted murders, and aggravated batteries. The State responds that the testimony was necessary to tender Demierre as an expert witness. Furthermore, according to the State, Demierre's testimony was relevant to show motive; and any prejudicial effect of the evidence was outweighed by its probative value.

¶ 15 We agree with the State. Generally, evidentiary motions such as motions *in limine*, are directed to the trial court's discretion, and reviewing courts will not disturb a trial court's evidentiary ruling absent an abuse of discretion. *People v. Harvey*, 211 Ill. 2d 368, 392 (2004). An abuse of discretion will only be found only where the trial court's ruling is arbitrary, fanciful, unreasonable, or where no reasonable person would take the view adopted by the trial court. *People v. Hogan*, 388 Ill. App. 3d 885, 890 (2009) (citing *People v. Hall*, 195 Ill. 2d 1, 20 (2000)).

¶ 16 A trial court's decision to admit gang evidence will not be overturned absent a clear abuse of discretion. *People v. Williams*, 324 Ill. App. 3d 419, 432-33 (2001) (citing *People v. Gonzalez*, 142 Ill. 2d 481, 489-90 (1991)). This court employs a three-part analysis to determine the issue: (1) whether Demierre's testimony qualifies as an expert opinion; (2) whether his testimony was relevant; and (3) whether the prejudicial effect of his testimony outweighed its probative value. See *Williams*, 324 Ill. App. 3d at 430; *Cruzado*, 299 Ill. App. 3d at 141. In the present case, defendant does not argue that Demierre is not an expert concerning gangs. Defendant argues that the testimony was not relevant and that the prejudicial effect of the testimony was outweighed by its probative value.

¶ 17 Regarding relevance, defendant argues that the evidence was not relevant because there was no evidence that the crime was gang related. The State responds that Demierre's testimony provided the jury with a potential motive for an otherwise unexplainable crime. Although prejudicial, gang-related evidence will not necessarily be excluded if it is relevant and admissible. *Williams*, 324 Ill. App. 3d at 431 (citing *Gonzalez*, 142 Ill. 2d at 489). Relevant evidence is that which has any tendency to make the existence of a fact of consequence to the determination of the action more or less probable than it would be without the evidence. *Id.*

Gang-related evidence is admissible to show that the defendant acted with a common purpose or was part of a common criminal design, or to provide a motive for an otherwise inexplicable act. *Williams*, 324 Ill. App. 3d. at 431 (citing *Smith*, 141 Ill. 2d at 58).

¶ 18 Here, the State offered the gang-related evidence to provide the jury with a motive for the crime. After corroborating testimony from the victims, Demierre testified that defendant and Berrum were members of the Latin Kings gang, while the victims were affiliated with a rival gang, the Maniac Latin Disciples. Demierre further testified that one of the victims left the Latin Kings and became a member of the Maniac Latin Disciples. Demierre testified that, when a gang member leaves one gang to join another, punishment was typical and could range from a beating to murder. Demierre's testimony informed the jury of a possible motive for what otherwise appeared to be a random shooting. Because gang-related evidence is admissible to provide a motive for an otherwise unexplainable act, Demierre's testimony regarding defendant's and the victims' gang affiliations was relevant. See *Id.*

¶ 19 With regard to the third prong of the *Williams/Cruzado* analysis, defendant argues that even if the gang-related evidence was probative, its probative value was outweighed by its prejudicial effect. Defendant takes issue with Demierre's testimony that he knew defendant to be affiliated with a gang based on prior contacts with him. Defendant asserts that this testimony implied that that defendant was routinely involved in criminal activity. However, contrary to defendant's assertion, the record reflects that Demierre did not elaborate on this statement and made no mention of the circumstances surrounding defendant's prior contacts with police. From a review of the transcript, one could have concluded that defendant was in contact with police because he was an innocent victim of gang-related violence as it is that one might conclude he was the perpetrator. For example, in *People v. Meeks*, 382 Ill. App. 3d 81, 88 (2008), the trial

court found that testimony from a police officer regarding evidence of defendant's stored fingerprints on a government database, did not imply that defendant had a prior criminal history because it was common knowledge that there are many innocuous reasons why an individual's fingerprints may be stored, including being the victim of a crime. The same is true in the present matter; there are many innocent reasons, including being the victim of a crime, where an individual may have contact with police without being involved in criminal activity. Thus, we determine that Demierre's testimony that he had "prior contacts" with defendant does not imply to a jury that defendant had a criminal history. Moreover, we determine that the trial court did not abuse its discretion when it granted the State's motion *in limine* to allow gang-related evidence.

¶ 20 Defendant cites to several cases in support of his position. In *People v. Stover*, 89 Ill. 2d 189, 196 (1982), a police officer testified that he was previously acquainted with the defendant and the State questioned the officer on the nature of the acquaintance. Although our supreme court mentioned that "evidence that the arresting officer was previously acquainted with defendant does not necessarily imply a criminal record," our supreme court determined that, under the circumstances of that case, there was no apparent reason why the State would inquire into the defendant's previous acquaintance with the officer unless an implication of prior criminal activity was intended. This is distinguishable from the present matter, where the State elicited the challenged testimony for foundational purposes to certify Demierre as an expert witness. The State, here, did not ask Demierre to elaborate and limited the testimony elicited to its intended and admissible goal: to certify Demierre as an expert witness.

¶ 21 In *People v. Arman*, 131 Ill. 2d 115, 123 (1989), our supreme court determined that allowing a testifying police officer to reference a photograph of the defendant as having come

from the Chicago police department's identification files was error because doing so informed the jury that the defendant had been previously arrested. *Id.* Our supreme court determined that referencing the mug shot constituted evidence of other crimes and should not have been admitted. *Id.* *Arman* is distinguishable from this case because it involved showing the jury a mug shot of the defendant taken following an arrest for an unrelated crime. Because the mug shot implied that the defendant had been previously arrested at some other point in time, our supreme court concluded that it constituted evidence of other crimes and was improper. *Id.* This was not the case here. In the present matter, there was no evidence that defendant committed other crimes. Demierre's testimony provided only that defendant had prior contacts with the police. Demierre did not elaborate further and did not specify to the jury why defendant was in contact with police. As there are many innocent reasons why an individual may come in contact with the local police, the testimony in the present matter is did not prejudice defendant as it did in *Arman*. See also *Meeks*, 382 Ill. App. 3d at 88.

¶ 22 Defendant urges this court to consider *People v. Roman*, 2013 IL App (1st) 110882, wherein the reviewing court found that the State had failed to establish a connection between the crime and the gang-related testimony; the gang-related evidence was not relevant to motive or to the witnesses' identification of the offenders. *Id.* ¶¶ 25-30. In *Roman*, the defendant's gang membership was not the basis for the witnesses' familiarity with the defendant, *i.e.*, the witnesses testified that they knew the defendant because he lived in the same neighborhood, they all identified the defendant in a photo array, a lineup, and in court; and none had mentioned the defendant's tattoos in their testimony or suggested the tattoos helped to identify him as one of the perpetrators. *Id.*

¶ 23 We have considered the circumstances and holding of *Roman* and determine they are distinct from the circumstances in the present case, and therefore, not persuasive. We agree with the State and the trial court that the gang-related evidence was relevant to provide a motive and context for the shooting. The gang-related evidence directly related to the circumstances and the crime charged and spoke to defendant's motive for targeting the victims. See *Smith*, 141 Ill. 2d at 58. Specifically, the victim's Martin and Reggie testified that they had prior gang affiliations and that defendant and Berrum used to affiliate with a rival gang. Demierre's testimony established that an individual's punishment for leaving or switching a gang affiliation could include murder. Accordingly, this commonality explained how defendant, Berrum, and the victims knew each other, and the trial court properly admitted the gang-related evidence to show motive.

¶ 24 Defendant also cites *People v. Mason*, 274 Ill. App. 3d 715 (1995). In *Mason*, the appellate court determined that the organizational structure of a gang was relevant to prove a possible motive, but evidence that the defendant was involved in the sale of drugs was inadmissible because it was not relevant to the charges. In the present case, evidence presented at trial suggesting that defendant was, himself, guilty of other crimes, is tenuous. Moreover, the appellate court in *Mason* affirmed some of the gang-related evidence to show motive. In *Mason*, the evidence found to be proper was far more detailed and inculpatory than the evidence adduced during this trial. In the current matter, any prejudicial effect was outweighed by the probative value of Demierre's testimony. We conclude that the trial court did not abuse its discretion when it granted the State's motion *in limine* and admitted the gang-related evidence.

¶ 25 Defendant also argues that the State engaged in prosecutorial overkill when it elicited testimony from Demierre regarding the proliferation of Elgin street gangs and their involvement

in criminal activity. Defendant argues that doing so was similar to allowing the introduction of other crimes evidence. The State responds that Demierre's testimony did not link defendant to other crimes and was not overkill. We agree with the State.

¶ 26 A trial court must take great care to guard against overkill. *People v. McCray*, 273 Ill. App. 3d 396, 402-03 (1995). In *People v. Nunley*, 271 Ill. App. 3d 427 (1995), the defendant was on trial for the 1988 armed robbery and murder of Paul Ray, Jr. *Id.* at 433. During trial, police officers testified that they had learned of the crimes against Ray in July 1989 during an arrest and investigation of an alleged aggravated battery of the defendant's mother. The officers testified that, while in police custody, defendant confessed to stabbing his mother and killing her dog, but he then confessed to the March 1988 murder and armed robbery of Ray in Ray's home. The officers expounded on the details of the mother's stabbing and the dog's killing, testifying that the defendant was covered in blood and "calmly" told the officers that he had stabbed the mother because "she had Satan in her and he had to get Satan out and the best way to do that was to cut her head off." The officers further testified that, when the family dog intervened, the defendant had stabbed it too, because it was also possessed by Satan. The defendant's confession of stabbing his mother and killing the dog and the surrounding circumstances were introduced as other-crimes evidence. *Id.* at 431. The jury found the defendant guilty of the armed robbery and murder of Ray. On appeal, the reviewing court reversed and remanded for a new trial, holding that the "detail and repetitive manner" in which the other-crimes evidence was presented "greatly exceeded" what was required to establish the voluntariness of the defendant's confession and subjected the defendant to a "mini-trial over conduct far more grotesque than that for which he was on trial." *Id.* at 432.

¶ 27 In contrast to *Nunley*, Demierre's general testimony regarding gangs was not more specific or grotesque than C.M.'s sexual assault. The details of T.W.'s sexual assault were similar to C.M.'s sexual assault. Neither did the State unduly belabor the evidence.

¶ 28 Here, the record reflects that the trial court limited the gang-related evidence to that which was necessary to prove motive and to certify Demierre as an expert witness. Demierre's testimony that he had investigated crimes committed by gang members was general in nature. The record reflects that this portion of Demierre's testimony served the purpose of qualifying Demierre as an expert witness in gangs, gang membership, and gang identification. The trial court, in considering defendant's motion for judgment notwithstanding the verdict, stated that it had carefully reviewed the alleged overkill and determined that the gang-related testimony did not warrant granting defendant's motion. The record reflects that the trial court took care to limit the scope of the evidence and mitigate its prejudicial effect. We determine that the trial court did not abuse its discretion when it allowed Demierre's testimony. Accordingly, we determine that the State did not engage in prosecutorial overkill when it elicited testimony regarding gangs and gang activity.

¶ 29 Defendant next contends that his mittimus should be amended to reflect a credit against his sentence for the 881 days he spent in presentence custody; the State confesses error. Our review is *de novo*. *People v. Jones*, 397 Ill. App. 3d 651, 654 (2009). In the present matter, the record reflects that defendant entered custody on March 5, 2011, and remained in continuous custody through August 3, 2012, the date the mittimus was issued. The mittimus does not include any credit against his sentence for the time he spent in custody before his sentencing. Accordingly, we direct the clerk of the circuit court on remand to correct the mittimus to show a credit for 881 days of presentence custody. See *People v. Butler*, 354 Ill. App. 3d 57, 69 (2004).

¶ 30 Defendant's final contention is that the trial court erred when it found that defendant was required to register under SORA. Specifically, defendant argues that, because there is no evidence that his crime was sexually motivated, this court should make a determination from the record that his crimes were not sexually motivated and that he has no duty to register under SORA. The State takes no position on whether defendant's crime was sexually motivated, but maintains that a remand is warranted for the trial court to make a determination on the issue.

¶ 31 A defendant convicted of attempted murder who is at least 17 years old at the time of the offense and whose victim is under the age of 18, must register under SORA if the trial court determines that the crime was sexually motivated. 730 ILCS 150/2(B)(1.6) (West 2010). If the trial court determines that the crime was not sexually motivated, defendant is required to register under VOYRA. 730 ILCS 154/5(b)(2) (West 2010). However, before a defendant is required to register under SORA or VOYRA, the trial court is required to determine whether the crime was sexually motivated and verify its finding in writing. *People v. Black*, 394 Ill. App. 3d 935, 939-42 (2009) (Noting that, although not preserved for appeal, the issue was not forfeited because the lack of a factual finding made that portion of the sentence void, and a void sentence can be corrected at any time). Our supreme court has characterized this finding as a factual determination. See, e.g., *People v. Cardona*, 2012 IL App (2d) 100542, ¶ 36 (citing *People v. Johnson*, 225 Ill. 2d 573, 582 (2007)).

¶ 32 Here, the trial court made no determination. Because the trial court failed to exercise its discretion, our review is *de novo*. *People v. McGee*, 286 Ill. App. 3d 786, 793 (1997). Accordingly, and pursuant to the procedure outlined in *Black*, we remand this cause to the trial court for a written determination as to whether defendant's crime was sexually motivated. If the trial court determines that defendant's offense was not sexually motivated, then the court must

verify the lack of sexual motivation in writing. See *Black*, 394 Ill. App. 3d at 945. We take no position on what finding the sentencing court should make.

¶ 33 For the forgoing reasons, we affirm in part, and remand. On remand, we direct the clerk of the circuit court to correct the mittimus to show a credit for 881 days of presentence custody, and we direct the trial court to conduct a hearing to determine whether defendant's crimes were sexually motivated.

¶ 34 Affirmed in part and remanded.