

SECOND DIVISION
April 28, 2015

No. 1-13-0372

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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 of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 10 CR 6792
)	
JOSE GONZALEZ,)	Honorable
)	William G. Lacy,
Defendant-Appellant.)	Judge Presiding.

JUSTICE PIERCE delivered the judgment of the court.
Justices Neville and Liu concurred in the judgment.

O R D E R

¶ 1 *Held:* The trial court did not abuse its discretion when admitting gang-related evidence and defendant was properly notified of use of such evidence; the evidence presented was sufficient to support defendant's conviction of first degree murder; and the State did not make an improper appeal to the emotions of the jury or make improper remarks during closing argument.

¶ 2 Following a jury trial, defendant, Jose Gonzalez, was found guilty of the first degree murder of Francisco Moreno and sentenced to 35 years' imprisonment with an additional 25-year sentencing enhancement for the use of a firearm which resulted in the victim's death. The

defendant fired two bullets at the victim's vehicle, according to the State's theory of the case, with the belief the vehicle contained rival gang members. The fatal bullet traveled through the vehicle and pierced the victim on the left side of his chest. Defendant maintained that his use of force was justified in self-defense because he believed the vehicle to be a "rammer," a vehicle used by gang members to either run over or commit drive-by shootings against rival gang members.

¶ 3 On appeal, defendant contends the trial court committed reversible error by allowing the State to admit gang-related evidence, including evidence of the gang confrontation that occurred just prior to the offense, and that the State failed to properly notify defendant of the use of such evidence. Defendant also challenges the sufficiency of the evidence to prove him guilty of first degree murder. Finally, he contends the trial court committed reversible error when it overruled defendant's objections to the prosecutor's inflammatory remarks during closing argument and to allegedly inflammatory statements elicited during the testimony of the State's life and death witness. We affirm the judgment of the trial court.

¶ 4 Approximately one year before trial, the State filed a motion to admit gang crimes evidence. The motion included a summary of the testimony to be admitted including evidence of defendant's gang affiliation as well as the gang confrontation that occurred just prior to the shooting. The admission of gang evidence was also litigated during pre-trial motions the day before trial. The trial court ruled it would allow the gang crimes evidence to prove motive and state of mind and notified the parties that a limiting instruction would be provided to the jury prior to the admission of any gang evidence.

¶ 5 During trial, the State called the victim's wife, Minerva Cortez, as a "life and death witness." Defendant objected at several points during Cortez's testimony arguing her testimony

went beyond the scope of a life and death witness. The trial court overruled the objection and Cortez was allowed to testify that she and the victim were married in Mexico and had two children, aged two and six. Cortez also testified that her husband was not a member of a gang and described his condition upon her arrival at the hospital. Cortez stated that she lived in Texas and the victim remained behind in Chicago to handle the family's affairs before he was to join them. During cross-examination, defendant attempted to elicit from the witness that she and her husband were living in the United States illegally and asked questions regarding her husband's drug and alcohol use. The State's objections to this line of questioning were sustained. During a sidebar, defendant again renewed his objection to Cortez's testimony.

¶ 6 Additional evidence at trial showed that on October 6, 2002, around 1:30 to 2 a.m., the victim was driving his vehicle down Avenue M towards 103rd Street in Chicago, Illinois. The vehicle was damaged and driving without headlights and the car's front bumper was dragging on the pavement emitting sparks. As the victim's vehicle approached the area where defendant was standing, defendant fired two shots, one of which pierced the driver's side door of the vehicle near the handle and struck the victim in the left side of his chest. This injury ultimately resulted in his death one day later. Around this same time, defendant was involved in a confrontation with five high-school-aged students he believed to be members of a rival gang, the Latin Kings. Defendant was a member of the Latin Dragons.

¶ 7 Just before the shooting, a group of five teenagers, including Erin Campbell, Marko Vukasevic, Isabel Herrera, Marc Navia, and Abel (A.J.) Arroyo (the teenagers), were walking home down Avenue M from a homecoming party they attended earlier that evening. On the way home, they passed a party defendant was attending with several other members of his gang. Defendant and his friends left the party to confront the teenagers to see if they were members of

the Latin Kings. The Latin Kings claimed control of the area where the confrontation occurred, so it was dangerous for members of defendant's gang to be seen there.

¶ 8 The gang members from the party, except for defendant, approached the teenagers yelling insults to their rival gang, like "King Killers" and "Vice Lord Killers." One of the gang members, Javier Olivarez, recognized the teenagers and told the other gang members that they were "neutrons," meaning not members of a gang. Despite this fact, a fight occurred between the gang members and two of the male teenagers, Arroyo and Navia. Defendant was not present during this fight because he ran to his home across the street to get a revolver for protection.

¶ 9 While Arroyo and Navia were fighting the gang members, Campbell, Herrera, and Vukasevic were able to separate from the larger group and continued walking down Avenue M. They made it to the corner of Avenue M and 103rd, but were stopped by defendant returning from his home across the street carrying the revolver. Defendant confronted the smaller group of teenagers while pointing the revolver directly at them and said, "Where the fuck are you going?" Defendant forced them to make signs disrespecting the Latin Kings and turned his gun to point directly at Vukasevic's forehead. Seeing this, Olivarez informed defendant that these three teenagers were also neutrons.

¶ 10 In the midst of the confrontation between defendant, Campbell, Herrera and Vukasevic, a loud noise was heard coming from 102nd Street and Avenue M. This loud noise was the victim's vehicle, traveling approximately 25 miles per hour or more down Avenue M near 103rd on the wrong side of the road, towards where defendant and the three teenagers were standing. Conflicting testimony was presented regarding whether or not the vehicle appeared as though the driver intended to hit the group standing on the corner. Two of the teenagers, Navia and Vukasevic, testified the vehicle did not appear to be a threat. Defendant, as well as Campbell and

two other gang members present during the offense, Ontiveros and Olivarez, testified the vehicle looked like it could potentially hit defendant and the three teenagers. In support of his belief, defendant testified the victim's vehicle was similar in appearance to a vehicle used to commit drive-by shootings approximately two to three weeks prior to the offense.

¶ 11 Conflicting testimony was also presented regarding whether the defendant fired the gun while the vehicle was beginning to turn away from the group or whether the vehicle made a complete right turn onto 103rd Street before defendant fired the gun. The teenagers, including Campbell, testified that defendant fired the gun after the vehicle completed the turn. Defendant and Ontiveros testified that the shots were fired as the vehicle was turning away, but before it had completed its turn. Regardless, defendant turned in the direction of the victim's vehicle and fired at least two shots. Shortly after defendant fired the gun, everyone fled the scene. Defendant was unaware that he had shot someone at this point.

¶ 12 The victim was found still in his vehicle early the next morning a little over a block away from the scene of the offense near 103rd Street and Avenue N. He was rushed to a hospital and his wife, Cortez, was contacted and notified of her husband's injury. Cortez was living in Texas at the time because they had plans to move their family there, so she flew back to Chicago and visited her husband in the hospital. When Cortez arrived at the hospital, her husband was in poor condition and unable to speak. He died later that night and Cortez identified the victim's body at the morgue the following day. The medical examiner concluded the victim died because of a gunshot wound to his chest. Testing completed at the hospital also revealed the victim had alcohol and cocaine in his system at the time of the offense.

¶ 13 Police officers investigating the homicide canvassed the neighborhood and spoke with Campbell. Campbell showed the officers defendant's home and was able to identify defendant as

the person who shot at the victim's vehicle from a photo array on October 8, 2002 and again on January 3, 2003. At that time, however, officers were unable to locate defendant or bring him in for questioning.

¶ 14 When defendant learned the police were looking for him, he fled to a hotel in Hammond, Indiana. Members of the Latin Dragons who went to visit defendant while at the hotel, testified that defendant told them the victim's vehicle was trying to hit him, so he shot at it, and that he planned to flee to Mexico. Defendant, in fact, fled to Mexico for approximately six years until he was finally apprehended in Mexico by the FBI in 2008, extradited back to Chicago in March of 2010, and stood trial in 2012.

¶ 15 In closing, defendant argued he was justified in using deadly force against the victim in self-defense, supported by his belief that the victim's vehicle was a "rammer." The jury found defendant guilty of first degree murder.

¶ 16 On appeal, defendant first contends that any and all gang-related evidence was improperly admitted by the trial court because it was more prejudicial than probative. In the alternative, defendant argues that the trial court improperly admitted evidence of the gang confrontation that occurred just prior to the shooting because that evidence was likewise more prejudicial than probative. Because the first argument necessarily encompasses the same evidence presented by the second, we will begin by discussing the probative value of the gang-related evidence as a whole. Finally, defendant contends he was not properly notified of the State's intent to use such evidence pursuant to Illinois Rule of Evidence 404(c) (eff. Jan 1, 2011).

¶ 17 Evidentiary rulings are within the discretion of the trial court and will not be reversed absent an abuse of discretion that results in manifest prejudice. *People v. Reid*, 179 Ill. 2d 297, 313 (1997); *People v. Barnes*, 2013 IL App (1st) 112873, ¶ 41. When determining whether the

prejudicial effect of the evidence substantially outweighs its probative value, the Illinois Supreme Court has recognized that prejudice means "an undue tendency to suggest decision on an improper basis, commonly an emotional one, such as sympathy, hatred, contempt or horror." *People v. Eyler*, 133 Ill. 2d 173, 218 (1989).

¶ 18 Due to the strong probability of prejudice with regard to gang activity, "trial courts should exercise great care in exercising their discretion to admit gang-related testimony," and it will only be admissible with sufficient proof that the gang membership or activity in the gang is related to the crime charged. *People v. Davenport*, 301 Ill. App. 3d 143, 152 (1998); *People v. Smith*, 141 Ill. 2d 40, 58 (1990). Although motive is not an essential element of murder, gang-related evidence may also be admissible to show motive for an otherwise inexplicable act if it qualifies as relevant evidence and its probative value outweighs the unfair prejudice it engenders. *People v. Resendez*, 273 Ill. App. 3d 751, 758 (1995); *Smith*, 141 Ill. 2d at 58; *People v. Johnson*, 208 Ill. 2d 53, 102 (2003). Furthermore, the State is not required to present a "watered-down version of events simply because otherwise highly probative evidence is unflattering to the defendant." " *People v. Morales*, 2012 IL App (1st) 101911, ¶ 29, quoting *People v. Rutledge*, 409 Ill. App. 3d 22, 26 (2011).

¶ 19 Defendant claims the gang-related evidence presented by the State was not sufficiently related to the crime charged where it did not support the State's theory of motive for the shooting. From the record, it appears the State's theory of the case was that the initial confrontation and the ultimate shooting at the victim's vehicle were motivated by gang rivalry, and thus, it used gang-related evidence to prove motive. In *Resendez*, 273 Ill. App. 3d at 759-60, this court upheld the trial court's admission of gang-related evidence to prove motive where the defendant and other gang members present during the offense brought a gun with them for

protection, the defendant yelled gang remarks before he shot the gun, there was evidence of animosity between two rival gangs, a gang confrontation occurred at the same time as the shooting, and the victim was an innocent bystander. We found it significantly relevant that the victim was an innocent bystander because without the gang-related evidence to provide motive, the defendant's actions were inexplicable.

¶ 20 Like *Resendez*, the State, in the present case, presented evidence that defendant and his friends were involved in a gang confrontation when the offense occurred. Evidence showed that defendant and his friends were yelling gang insults and throwing up gang signs when confronting the group of teenagers just prior to the shooting; that defendant went home to get a gun for protection because he thought he was confronting rival gang members; that defendant believed the victim's vehicle was a "rammer;" that there was current animosity between defendant's gang, the Latin Dragons, and the gang he believed the teenagers to be involved in, the Latin Kings; that the defendant was in Latin King territory; and that the victim was not involved in a gang, but happened to drive his car in the area where defendant was confronting individuals he thought were from a rival gang. Furthermore, without the admission of this gang-related evidence, there would be no explanation for defendant to be in the middle of the street by himself carrying a gun, and no reason or motive to shoot at a vehicle just because it appeared to be emitting sparks and/or driving in his direction.

¶ 21 Therefore, we find the trial court did not abuse its discretion by allowing the State to present gang-related evidence where the gang-related evidence was sufficiently related to State's theory of motive. It follows, therefore, that we find no abuse of discretion by the trial court's admission of testimony regarding the gang confrontation leading up to the shooting.

¶ 22 Defendant also contends he did not receive proper notice of State's intent to admit gang-related evidence pursuant to Illinois Rule of Evidence 404(c) (eff. Jan 1, 2011). Where the facts are not in dispute and the issue presented constitutes solely a question of law, the reviewing court will review the issue *de novo*. *People v. Robinson*, 322 Ill. App. 3d 169, 173 (2001).

¶ 23 In a criminal case, if the prosecution intends to use gang-related evidence, it must provide the defense with advance notice at a reasonable time before trial which includes a summary of the testimony or the actual statements of the witnesses. Ill. R. Evid. 404(c).

¶ 24 The State filed notice of its intent to use gang-related evidence on November 29, 2011, almost a year before trial. The notice included a summary of the testimony and the State cited *People v. Patterson*, 154 Ill. 2d 414, 489 (1992), in support of its motion which provides that evidence of gang-related crimes may be used to explain an otherwise inexplicable act, leaving no doubt the State provided proper notice. Even though defendant claims he was not notified until immediately before trial that the trial court intended to admit gang-related evidence to show state of mind, defendant cites no case law that supports his argument that the State is required to notify the defendant of every argument it might make based upon the evidence. Thus, we find no basis for interpreting the rule to include this requirement as defendant suggests and find defendant was given sufficient notice of the State's intent to present gang-related evidence.

¶ 25 Defendant also argues that the State failed to prove him guilty of first degree murder beyond a reasonable doubt where the evidence was insufficient to prove that defendant formed prior intent or planned to approach the victim's vehicle in a reckless manner and where the jury ignored evidence that defendant acted in self-defense.

¶ 26 When a defendant challenges the sufficiency of the evidence to sustain his conviction, the relevant question on review is whether, after considering the evidence in the light most favorable

to the State, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *People v. Beauchamp*, 241 Ill. 2d 1, 8 (2011); *People v. Collins*, 106 Ill. 2d 237, 261 (1985). A conviction will only be overturned where the evidence is so improbable, unsatisfactory, or inconclusive that it creates a reasonable doubt of defendant's guilt. *Beauchamp*, 241 Ill. 2d at 8.

¶ 27 The determination of whether the defendant acted with the requisite intent to prove first degree murder is a question of fact and may be inferred from the circumstances surrounding the incident, the defendant's conduct, and the nature and severity of the victim's injuries. *People v. Renteria*, 232 Ill. App. 3d 409, 416 (1992). Proof that a death resulted from a defendant's act of deliberately firing a gun in the general direction of the victim is sufficient to sustain a conviction for first degree murder even if the victim's death was " 'caused unintentionally.' " *People v. Lemke*, 384 Ill. App. 3d 437, 449 (2008) quoting *People v. Deacon*, 130 Ill. App. 3d 280, 287-88 (1985).

¶ 28 Defendant does not dispute that he fired the gun, nor does he dispute that his action resulted in the death of the victim. Rather, defendant contends he did not act with the requisite intent to be convicted of first degree murder because the State did not adduce evidence of the defendant's prior intent or planning. Evidence of prior planning, however, was not necessary to prove defendant acted with the requisite intent to sustain his conviction. See *People v. Howery*, 227 Ill. 2d 1, 42-3 (1997) ("In order to prove murder, it is not necessary to show that defendant had a specific intent to kill"); See 720 ILCS 5/9-1(b)(11) (West 2010) (evidence of premeditation is merely an aggravating factor of first degree murder which makes defendant eligible for enhanced sentencing). It was sufficient, therefore, that defendant voluntarily turned and fired his gun multiple times directly at the victim's passing vehicle.

¶ 29 Defendant also contends that the State failed to prove defendant guilty beyond a reasonable doubt where the jury ignored defendant's evidence of self-defense.

¶ 30 When a defendant raises the issue of self-defense and introduces at least some evidence to support all the factors, the burden then shifts to the State to prove beyond a reasonable doubt that defendant did not act in self-defense. *People v. Huddleston*, 243 Ill. App. 3d 1012, 1018 (1993). If the State negates even one of these elements beyond a reasonable doubt, then the State has met its burden and the defense must be rejected. *People v. Murillo*, 225 Ill. App. 3d 286, 292 (1992). Whether a killing is justified as self-defense is a question of fact and the fact finder is not required to accept the defendant's evidence as true in support of that defense. *Huddleston*, 243 Ill. App. 3d at 1018.

¶ 31 Here, it was not disputed by the parties that defendant presented sufficient evidence to meet all the requirements of self-defense (*i.e.* he shot at the vehicle to keep it from running over him). However, the limited physical evidence presented regarding the shooting supports the State's theory that the vehicle had already turned away and was not a threat when defendant fired the gun. The investigating detective testified:

"A: This is the same vehicle, the vehicle where the victim was found. *** It depicts a single bullet hole to the driver's door just off the handle.

* * *

Q: Was there anything unusual about that door?

A: As it was that night, you see what we referred to as a *** through and through gunshot, from the outside through the inside of the door."

Based on these facts, we cannot find that it was so improbable or unreasonable for the jury to conclude that defendant did not justifiably act in self-defense when shooting at the victim's vehicle. Therefore, we conclude the State proved defendant guilty beyond a reasonable doubt.

¶ 32 Defendant's final contention regarding improperly admitted evidence concerns the testimony of the State's life and death witness, Cortez, and the prosecutor's reference to the victim's family during closing argument.

¶ 33 Defendant first contends the trial court committed prejudicial error by allowing the scope of Cortez's testimony to extend beyond life and death so as to constitute an improper appeal to the emotions of the jury where Cortez's testimony dwelled on the victim's family.

¶ 34 The State is permitted to call life and death witnesses to identify the victim and the fact of his death. *People v. Bost*, 80 Ill. App. 3d 933, 952 (1980). When this proof is offered through relatives, the trial court must take caution that no undue emphasis is placed on the fact that the victim left a surviving family. *Id.* at 953. However, brief testimony consisting solely of introductory and background questions where the State did nothing to make the testimony appear material to establishing guilt or innocence does not constitute prejudicial error where the improper evidence was elicited in an incidental manner. *People v. Harris*, 225 Ill. 2d 1, 32 (2007); *People v. Thompkins*, 121 Ill. 2d 401, 446 (1988).

¶ 35 Reviewing Cortez's testimony as a whole, we are unable to find any error with the elicited testimony. Although Cortez's situation could have been viewed by jurors as a sympathetic one, this testimony was not elicited merely to engender sympathy in the jury, nor did it improperly focus on the fact the victim left behind a family so as to warrant reversal. The only mention of defendant's family was regarding background information of Cortez's personal knowledge of the victim (*i.e.* that they were married and had two sons together). While defendant

argues there are several statements that could appear to be inflammatory, these statements were incidental to the background questions asked by the prosecutor. See *Thompkins*, 121 Ill. 2d at 446.

¶ 36 Defendant also contends the trial court abused its discretion by allowing the prosecutor to make inflammatory remarks regarding the victim's family during closing argument. Specifically, defendant argues the State's reference during closing argument to the victim as, "a young man of 24 with his whole life ahead of him, two small children, and a lovely wife, bettering his life," was an improper reference to the victim's family.

¶ 37 The appropriate standard of review for closing arguments is currently unclear. In *People v. Wheeler*, 226 Ill. 2d 92, 121 (2007), our supreme court applied a *de novo* standard of review to the issue of prosecutorial statements during closing arguments. However, the *Wheeler* court cited with favor its decision in *People v. Blue*, 189 Ill. 2d 99, 128 (2000), which applied an abuse of discretion standard. We need not resolve the issue of the proper standard of review in the instant case, as our holding would be the same under either standard. See *People v. Thompson*, 2013 IL App (1st) 113105, ¶¶ 76-77 (acknowledging conflict regarding standard of review).

¶ 38 Although argument by the prosecution that dwells upon the victim's family is inflammatory and improper, the prosecutor is allowed wide latitude in making his opening and closing statements. *People v. Hope*, 116 Ill. 2d 265, 275 (1983); *People v. Hampton*, 78 Ill. 3d 238, 243 (1979). Even if the prosecutor's remarks may constitute improper comment, the verdict will not be disturbed unless the remarks resulted in substantial prejudice to the accused, such that without those comments the verdict would be different. *People v. Morgan*, 112 Ill. 2d 111, 132 (1986).

¶ 39 Applying these principles, it is clear that the prosecutor's closing remarks were not so prejudicial as to constitute an improper appeal to the jury's emotions, especially where any improper remarks were tempered by the trial court's jury instruction that both the opening and closing arguments were not to be considered evidence. See *People v. Sims*, 192 Ill. 2d 348, 637 (2000). Although there was potential for prejudice in the prosecutor's comments, murder victims do not live and die in a vacuum, and we cannot conclude that in the absence of these fleeting comments about the victim's family the verdict would have been different.

¶ 40 For the reasons explained above, we affirm the judgment of the circuit court of Cook County.

¶ 41 Affirmed.