

No. 1-14-0587

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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. 11 CR 8285
)	
DEXTER SHORTER,)	Honorable
)	Stanley Sacks,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE GORDON delivered the judgment of the court.
Justices Hall and Reyes concurred in the judgment.

O R D E R

¶ 1 *Held:* The trial court's exclusion of certain gang evidence was not an abuse of discretion when the victim's alleged membership in a gang was not relevant. The trial court conducted a proper preliminary inquiry under *People v. Krankel*, 102 Ill. 2d 181 (1984).

¶ 2 Following a jury trial, defendant Dexter Shorter was found guilty of first degree murder and sentenced to a total of 50 years in the Illinois Department of Corrections (IDOC). On appeal, he contends that he was denied a fair trial because the trial court excluded gang evidence. He further contends that the trial court relied upon the wrong standard when denying him relief following a preliminary inquiry pursuant to *People v. Krankel*, 102 Ill. 2d 181 (1984). We affirm.

¶ 3 Defendant's arrest and prosecution arose out of the April 2, 2011, shooting death of the victim, Marvin Flanagan.

¶ 4 In its opening statement, the State argued that the victim was shot by defendant in front of five witnesses and characterized the offense as "senseless." In its opening statement, the defense argued, *inter alia*, that the evidence at trial would demonstrate that the victim was a "gang enforcer." The State objected. The trial court overruled the objection, holding that if defense counsel "can establish that, he can establish that." The defense further argued that someone shot at defendant as he was speaking to the victim. After surviving this "assassination attempt," defendant left town. He later learned that the victim had been struck by a bullet meant for him.

¶ 5 Vicki Cummings, the victim's wife, testified that as she walked over to where the victim was standing on April 2, 2011, she observed Owen "Chiefy" Washington and Lee Anthony Little.¹ Little was known as "Lebok" or "Little Lee." Washington walked up to the victim and said "long time no see." At the same time, Cummings observed defendant walk across the street, pull out a gun and shoot the victim. The victim fell to the ground and defendant ran away. When

¹ Although Cummings described herself as "single," and the victim as her "ex-husband," the couple had not divorced at the time of the victim's death; rather, they were separated and remained friendly.

the police arrived, Cummings told officers that defendant shot the victim. She later identified defendant in a photographic array and a lineup.

¶ 6 During cross-examination, a sidebar was held in the court's chambers. The defense wished to question Cummings about a visit she made to her nephew in jail at some point prior to the shooting. The defense argued that this visit was relevant because defendant went with her and it showed "more of a relationship" between defendant and Cummings, specifically, that defendant was a "low range worker in their organization." The State responded that there was no motion to admit gang evidence and that it was not "proper for it to be brought up." The court ruled that the defense could ask Cummings whether she visited her nephew.

¶ 7 When testimony resumed, Cummings denied that she and defendant went to visit her nephew "in the months before this incident." She also denied that her nephew was a "chief" within the Four Corner Hustler gang.

¶ 8 Michelle Jackson, Cummings' daughter, testified consistently with Cummings that defendant crossed the street to the victim, pulled out a gun and fired. The victim fell to the ground with "[b]lood *** leaking out of his face like a water fountain." She later identified defendant in a photographic array and a lineup. During cross-examination, Jackson testified that she did not hear defendant and the victim exchange any words, and that her boyfriend was Jesse Patrick. Defense counsel then asked whether Patrick liked defendant. The State objected and the court sustained the objection.

¶ 9 James Cooper, Cummings' son, testified that he was walking toward a group which included his mother and the victim when he observed defendant cross the street, pull out a gun and shoot the victim.

¶ 10 Lee Anthony "Lee Box" Little, who was serving a four-year prison term for possession of a controlled substance at the time of trial, testified that he and his cousin Owen Washington were driving to a funeral when he pulled over and Washington exited the vehicle. Washington crossed the street to where the victim, Cummings and Jackson were standing. Defendant walked behind Washington. Little exited the vehicle, then turned around to remove his keys from the ignition. At this point, he heard a gunshot. When he looked back, he did not observe the victim. Washington and Cummings were "hollering and screaming" and defendant was walking away. During cross-examination, Little testified that he had known the victim for a "number of years." Defense counsel asked if he knew the victim to sell drugs. The State objected and the trial court sustained the objection.

¶ 11 Owen Washington testified that he exited the vehicle and walked to the victim because he had not been in touch with the victim in a while. Cummings was also present. Defendant walked across the street to the group. At one point, the victim looked over Washington's shoulder and said, "I hope we don't have to get into it about this." When Washington glanced back, he observed defendant standing behind him. He then observed a gun come over his shoulder. Defendant was holding the gun. He heard a gunshot and ducked. The victim fell to the ground, and defendant walked away.

¶ 12 During a break during the trial, the defense raised an objection for the record with regard to a question that it asked Little, *i.e.*, "did you know [the victim] to sell drugs." The defense argued that this case was "about an internal gang drug dispute," that asking witnesses who knew the victim whether he sold drugs "will help lay the foundation for the defense," and that the

victim's statement about getting "into it" played into that defense. The court ruled that objection was "still sustained."

¶ 13 Nisah Dixon, who formerly dated defendant, testified that defendant came to her home in Woodstock on the afternoon of April 2, 2011. He made several calls on his cellular phone, then broke the phone with his hands. Defendant asked for a towel, bleach, and clothing. Dixon also gave defendant a plastic bag. Defendant took the bleach and the towels into the bathroom. It appeared to Dixon that defendant used the bleach while he was showering. Defendant later used her phone to make phone calls, including to his cousin Deldrick Johnson. Dixon heard defendant ask Johnson to send money to the Wal-Mart in Woodstock in her name. Later, at Wal-Mart, Dixon signed for the \$410 "moneygram" and defendant bought clothes and a cellular phone. Back at her home, Dixon and defendant engaged in sexual intercourse. He then left.

¶ 14 During the testimony of Detective Wayne Raschke, the defense asked whether Raschke indicated in certain police reports that the victim was a member of the Traveling Vice Lords and that the victim's death was "narcotics related." The State objected to each question and the trial court sustained each objection.

¶ 15 Following Detective Raschke's testimony, defense counsel asked to make an offer of proof as to those questions. The trial court responded, "[o]ther than it being all kind of hearsay what's the relevance?" The defense responded that "the evidence will show that there is a gang dispute that is going on that would lead to people shooting at [defendant] which is how we are proposing to the Court that the decedent got hit." The defense further argued that this gang evidence provided a motive for an "otherwise inexplicable act." The trial court concluded that the

two questions posed to Detective Raschke "clearly" called for "improper hearsay testimony," that gang membership "alone" did not establish motive, and that it was not illegal to belong to a gang.

¶ 16 Defendant testified in his own defense that he previously sold drugs for a living. When counsel asked defendant who he worked for, the State objected. The trial court sustained the objection. Defendant knew the victim and the State's witnesses from the area where he grew up.

¶ 17 On April 2, 2011, he observed the victim on the street. The victim said "Check it out Little D," and made a hand gesture waving defendant toward himself. As defendant approached the victim, a vehicle passed him. Defendant flagged down the vehicle and approached the driver's side of the vehicle. Defendant then told Little, who was in the vehicle, that the victim was "on bullshit," that is, up to something. Little's response indicated that Little was going to "help" defendant. Little and Washington exited the vehicle and walked toward the victim. Defendant was behind them.

¶ 18 Defendant approached the victim to talk. However, he heard footsteps and a gun being "cocked" behind him. He looked over his left shoulder. At this point, defendant began to run. He went to his vehicle and drove away "as fast" as he could to Dixon's home in Woodstock. En route, he noticed that he smelled because he had "shitted and pissed" himself. When defendant arrived at Dixon's home, he took a shower. He then asked Dixon for some bleach so that he could remove the smell of "shit" out of the bathroom and off his hands. After his shower, defendant called his cousin Deldrick Johnson. He asked Johnson to go to his home, obtain certain money and send it to the Wal-Mart in Woodstock. The money was sent in Dixon's name because defendant did not have his identification. Johnson told defendant that the victim was shot. Defendant "felt kind of f*** up about it." Although defendant was "sad," he was also

"pissed" because Johnson said Cummings was "telling everybody" that defendant was the shooter. Defendant threw his phone to the ground. He was scared. Although he "really" did not want to say who he was afraid of, he admitted that he was afraid of the shooter.

¶ 19 Defendant picked up clothes and "hygiene products" at Wal-Mart because he thought he was going to stay at Dixon's "for a while." However, he left Woodstock and went to Rockford. After a week and a half he took the bus to Boston with his girlfriend Danielle Baker and their son. En route to Boston, defendant phoned his aunt Rashanda Walker to obtain the phone number of an aunt who lived in Boston. During this phone call, Walker told him that the police went to his mother's house with a warrant for defendant's arrest. Defendant stayed in Boston for about a week and a half. He returned to Chicago when he thought his girlfriend and child were safe in order to speak to the police and clear his name. Defendant admitted that he was on the street on April 2, 2011, but denied that he had a gun and that he shot the victim. Defendant testified that someone shot the victim, but that he did not "want to say" who it was.

¶ 20 During cross-examination defendant testified that his conversation with the victim lasted less than two minutes. He then heard someone step up behind him. Only the victim, Little, Washington and defendant were on the street. Cummings and Jackson were not there. When defendant looked over his shoulder, he observed a black man with a gun. He knew this man's name, but would "rather not say it." A shot was fired at him and he ran away. He did not call the police.

¶ 21 During the jury instruction conference, the defense asked to introduce into evidence certified copies of the victim's narcotics convictions under case numbers 09 CR 18141, 02 CR 00551, and 01 CR 08007. The State responded that these exhibits were inappropriate and

irrelevant. The court permitted the defense to place the documents in the court file, but ruled that the jury would not hear about them and denied the defense's request to offer them in evidence.

¶ 22 The defense then argued that it was proper for it to ask whether the victim was a member of the Traveling Vice Lords gang and that it was proper for defendant to testify regarding his firsthand knowledge of the victim's participation in gang activities because it went to the motive behind a shooting targeting defendant which resulted in the victim's death. The defense argued that the trial court's ruling prevented it from presenting a defense and from bringing out the bias and motive of each witness. The trial court stated that its prior ruling was to stand. The defense then asked for permission to reopen its case. The trial court denied the defense's motion.

¶ 23 The State argued in closing argument that the victim's death was a "senseless act of violence" and urged the jury to believe the five eyewitnesses rather than the "preposterous" notion that the victim was shot by someone else. The defense responded that the State never gave an explanation for the shooting, but that defendant did. The defense also argued that defendant never had a gun and that there was "more to the story" that the jury did not hear. In rebuttal, the State agreed that there was an issue between the victim and defendant, but that no one would ever know what it was. The jury found defendant guilty of first degree murder

¶ 24 Defense counsel then filed a posttrial motion for a new trial alleging, *inter alia*, that defendant was denied his right to present a defense because the trial court prevented defendant from presenting certain gang evidence at trial.

¶ 25 At a July 2013 court date, defendant addressed the court and presented two *pro se* motions. The first was a posttrial motion for a new trial alleging that he was denied the effective assistance of counsel when counsel failed to, *inter alia*, investigate and subpoena defendant's

witnesses and to adequately cross-examine "the complaining witnesses." The second motion requested the appointment of new counsel. After reviewing the motions, the court found that defendant was not entitled to a new appointed attorney "at this point" and denied that motion. However, the court stated that if "the court finds some evidence that your lawyer was ineffective, [the] court can appoint the lawyer at that point to represent you further." Defendant later filed a supplemental *pro se* posttrial motion for a new trial.

¶ 26 On December 12, 2013, the trial court held a preliminary inquiry pursuant to *People v. Krankel*, 102 Ill. 2d 181 (1984). Defendant argued that counsel failed to subpoena witnesses Deldrick Johnson, Rashanda Walker and David Nero. Defendant argued that Johnson told defendant that the victim was shot and that Walker told defendant that the police were looking for defendant. Defendant argued that this testimony would have corroborated his testimony that when he discovered that the police were looking for him he returned to clear his name. Additionally, Nero would say that he observed defendant and Cummings speaking "without the presence" of the victim before the shooting which would show a "conflict of interest" with Cummings' testimony at trial. Defendant also argued that defense counsel should have asked "the neighbors" what they had observed. He concluded that these witnesses would have supported his theory of the case beyond a reasonable doubt. Defendant also argued that counsel should have impeached Cummings because at one point she said there were two gunshots and at another time she indicated there was only one.

¶ 27 Defendant next argued that his counsel was ineffective when counsel agreed with the State that the victim's prior convictions should not be admitted into evidence. However, the trial court stated that defense counsel filed a motion in *limine* "to bring it out," but that the court

denied the motion because the court found it "improper." Defendant then argued that counsel failed adequately to cross-examine the "complaining witnesses." The trial court found this argument unpersuasive, concluding it detailed "impeachment on collateral issues rather than things that would affect the trial." Defendant also alleged that counsel failed to provide an "expert witness" to testify that the witnesses could not have observed what "they say they saw."

¶ 28 After defendant finished his argument, the trial court asked defense counsel whether counsel had "anything to add or comment about." Defense counsel answered no. The court then asked the State whether it wanted to comment. The State stated that defense counsel "zealously represented" defendant. In denying defendant's motion, the trial court stated:

"What this argument is, I don't mean to make it sound like it's trite, it's an argument of someone who was found guilty who believes in his mind he did not commit the crime. ***

Talking about your lawyers didn't do this, didn't do that, things you commented about today during your argument and things commented in your motion for a new trial, a lot of which deal with evidentiary issues as opposed to ineffectiveness. *** I see nothing about what they did that was ineffective whatsoever. *** [A] lot of things what you told me today about what the witnesses would testify about first of all is really you saying what they would say, but aside from that, even assuming that were the case, nothing about what they would have said if they would have said those things you were telling me about would effect [sic] this trial one way or the other."

Ultimately, the trial court concluded that there was "nothing wrong" with what counsel did during trial "whatsoever" and that nothing defendant argued made the court think that it was necessary for the court to appoint new counsel because "nothing about what they did *** even raises a suggestion they were ineffective."

¶ 29 Defense counsel then argued counsel's posttrial motion for a new trial. The trial court denied the motion and sentenced defendant to 25 years in the IDOC for first degree murder. Defendant was also subject to a 25-year sentencing enhancement because a firearm was used in the commission of the offense.

¶ 30 On appeal, defendant first contends that he was denied a fair trial by the trial court's exclusion of certain gang evidence, that is, the victim's membership in a gang and involvement in the drug trade. He argues that absent this evidence, he could not present his defense that he was the target of a shooting by one of the victim's gang "associates," that the victim was accidentally shot, and that the witnesses banded together to place the blame on defendant. He concludes that the trial court erred in excluding this evidence as it was relevant, related to the victim's death and explained an otherwise inexplicable act.

¶ 31 "The admissibility of evidence rests within the discretion of the trial court, and its decision will not be disturbed absent the abuse of that discretion." *People v. Pikes*, 2013 IL 115171, ¶ 12. "An abuse of discretion occurs where the trial court's decision is arbitrary, fanciful or unreasonable [citation] or where no reasonable person would agree with the position adopted by the trial court [citation]." *People v. Becker*, 239 Ill. 2d 215, 234 (2010).

¶ 32 Generally, gang evidence is admissible to show common purpose or design, or to provide a motive for an otherwise inexplicable act. *People v. Smith*, 141 Ill. 2d 40, 58 (1990). Such

evidence may be admitted so long as it is relevant to an issue in dispute and its probative value is not substantially outweighed by its prejudicial effect. *People v. Johnson*, 208 Ill. 2d 53, 102 (2003). See also *People v. Weston*, 2011 IL App (1st) 092432, ¶ 22 (although gang evidence is prejudicial, it is admissible where it is relevant to motive). Before admitting gang evidence, however, the trial court must weigh its probative value against its prejudicial effect. *People v. Morales*, 2012 IL App (1st) 101911, ¶¶ 39-40.

¶ 33 Our supreme court has held that "evidence indicating a defendant is a member of a gang or is involved in gang-related activity is admissible only where there is sufficient proof that membership or activity in the gang is related to the crime charged." *People v. Strain*, 194 Ill. 2d 467, 477 (2000). In other words, before gang-related testimony is admitted, "the trial court must first determine that the evidence is *relevant*." (Emphasis in original.) *Weston*, 2011 IL App (1st) 092432, ¶ 28. We note that in the case at bar, it is not defendant's gang membership at issue; rather, it is the victim's alleged gang membership and involvement with drug sales that defendant wished to admit at trial to explain the victim's death. According to defendant, he did not shoot the victim; rather, the victim was accidentally shot when an unidentified person shot at defendant as the result of an "internal" gang dispute. However, we are unpersuaded by defendant's argument that the victim's alleged gang membership was relevant in this case.

¶ 34 Initially, we note that while it is true that the victim had prior narcotics convictions, no evidence was presented at trial that the victim was selling narcotics on the day or time of the shooting. Although defendant seeks support for his contentions that the victim belonged to a gang and that the victim's death was narcotics-related in certain police reports, police reports are

hearsay statements that are generally inadmissible as substantive evidence. See *People v. Shinohara*, 375 Ill. App. 3d 85, 113 (2007).

¶ 35 Under defendant's theory of the offense, the victim's membership in a gang is relevant because the victim's death was an accident. Evidence of the victim's alleged gang membership, in and of itself, was too general to be relevant as there is nothing illegal about membership in a gang. See *People v. Booker*, 274 Ill. App. 3d 168, 171 (1995) (evidence may be rejected as irrelevant when it has little probative value due to remoteness or potential prejudice). Gang evidence is admissible, however, to provide a motive for an otherwise inexplicable act. See *Smith*, 141 Ill. 2d at 58. The act at issue in this case was the shooting, which resulted in the victim's death. Therefore, the only relevant gang evidence under defendant's theory of the offense would be that relating to the shooter because it could explain the shooter's actions in shooting at defendant, *i.e.*, it could provide a motive for an otherwise inexplicable act. *Smith*, 141 Ill. 2d at 58. Although gang evidence might be relevant to explain the reason that defendant was the target of a shooting, we cannot agree with defendant's speculative conclusion that the victim's gang affiliation was relevant when, according to defendant's theory of the offense, the victim was shot accidentally. See *Weston*, 2011 IL App (1st) 092432, ¶ 28 (before admitting gang-related testimony, the trial court must first determine that it is relevant).

¶ 36 We cannot say that the trial court abused its discretion (*Pikes*, 2013 IL 115171, ¶ 12), when it denied defendant's attempts to introduce evidence of the victim's alleged gang membership and prior convictions as there was insufficient proof, even under defendant's theory of the offense, that the victim's membership in a gang was relevant because he was not the intended target of the shooting (*Strain*, 194 Ill. 2d at 477).

¶ 37 Defendant next contends that this cause must be remanded for a new *Krankel* inquiry because the trial court relied upon the incorrect standard when denying defendant relief. He argues that the court's conclusion that it "saw nothing about what [counsel] did that was ineffective whatsoever" was premature when he only needed to show "possible neglect."

¶ 38 When a defendant raises *pro se* posttrial claims of ineffective assistance of counsel, he is entitled to have those claims heard by the trial court. *People v. Krankel*, 102 Ill. 2d 181, 189 (1984). New counsel is not automatically appointed when a defendant alleges ineffective assistance of counsel. *People v. Moore*, 207 Ill. 2d 68, 77 (2003). Rather, "the trial court should first examine the factual basis of the defendant's claim." *Moore*, 207 Ill. 2d at 77-78. If, after a preliminary investigation into the allegations, the court concludes that the defendant's claims lack merit or pertain merely to matters of trial strategy, the court may deny the claim. *Moore*, 207 Ill. 2d at 78. If, however, the defendant's allegations reveal "possible neglect," the court should appoint new counsel to assist the defendant in presenting his claim. *Moore*, 207 Ill. 2d at 78.

¶ 39 During the preliminary-inquiry phase, "some interchange between the trial court and trial counsel regarding the facts and circumstances surrounding the allegedly ineffective representation is permissible and usually necessary in assessing what further action, if any, is warranted on a defendant's claim." *Moore*, 207 Ill. 2d at 78. The court may (1) discuss the allegations with the defendant, (2) briefly question defense counsel regarding the allegations, and (3) rely on its personal knowledge of defense counsel's performance at trial and the facial insufficiency of the defendant's claims. *Moore*, 207 Ill. 2d at 78-79. "If the court determines that the defendant's factual claim lacks merit or pertains only to matters of trial strategy, then the court need not appoint new counsel and may deny the *pro se* motion." *People v. Jackson*, 2016

IL App (1st) 133741, ¶ 69. We review *de novo* whether the trial court properly conducted a preliminary *Krankel* inquiry. *People v. Jolly*, 2014 IL 117142, ¶ 28.

¶ 40 Here, the trial court conducted a preliminary inquiry into defendant's *pro se* claims of ineffective assistance of counsel by reviewing defendant's *pro se* posttrial motion for a new trial paragraph by paragraph with defendant, and asking defendant to explain each allegation. After hearing all of defendant's arguments, the trial court asked defense counsel whether counsel wanted to say anything. Defense counsel declined. In denying defendant's motion, the trial court noted that most of his claims were evidentiary in nature, such as witnesses who would testify in support of defendant's version of events or potential impeachment of the State's witnesses.

However, the court stated that defendant had not convinced the court that the testimony of these witnesses or that the collateral impeachment of the State's witnesses would have affected the outcome of trial because five witnesses testified that defendant walked up to the victim and shot the victim. See *People v. Mays*, 2012 IL App (4th) 090840, ¶ 58 (an adequate inquiry involves the trial court understanding the defendant's claims and evaluating them for potential merit).

¶ 41 Ultimately, the trial court concluded, upon its own observation at trial and discussion with defendant that it "saw nothing about what [counsel] did that was ineffective whatsoever." See *Mays*, 2012 IL App (4th) 090840, ¶ 57 (when determining whether possible neglect exists, the trial court may rely on its conversations with trial counsel and the defendant, its knowledge of trial counsel's performance, and "its own legal knowledge of what does and does not constitute ineffective assistance"). The trial court properly relied upon its discussion with defendant and its personal knowledge of defense counsels' performance at trial when it denied defendant's motion. See *Jackson*, 2016 IL App (1st) 133741, ¶ 69.

¶ 42 We are unpersuaded by defendant's contention that the trial court's conclusion that it "saw nothing *** ineffective whatsoever" in counsels' performance held defendant to the higher standard of proving actual ineffective assistance of counsel. The record reflects that the trial court was clear that it was conducting a preliminary inquiry to determine whether new counsel should be appointed and that the court ultimately concluded "nothing defendant argued made the court think that it was necessary for the court to appoint new counsel." The court also noted, in denying defendant relief, that defendant's claims were evidentiary in nature and related to trial strategy. See *Moore*, 207 Ill. 2d at 77-78. Here, contrary to defendant's argument, the record does not establish that the trial court applied the wrong standard. See *In re N.B.*, 191 Ill. 2d 338, 345 (2000) ("The circuit court is presumed to know the law and apply it properly, absent an affirmative showing to the contrary in the record."); *People v. Howery*, 178 Ill. 2d 1, 32 (1997) ("the trial court is presumed to know the law and apply it properly" but "when the record contains strong affirmative evidence to the contrary, that presumption is rebutted"). Therefore, defendant's argument must fail.

¶ 43 For the reasons stated above, we affirm the judgment of the circuit court of Cook County.

¶ 44 Affirmed.