

2018 IL App (2d) 160302-U
No. 2-16-0302
Order filed August 2, 2018

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of Kane County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 15-CF-1053
)	
ERIK ESPARZA,)	Honorable
)	Donald M. Tegeler,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE BURKE delivered the judgment of the court.
Justices McLaren and Birkett concurred in the judgment.

ORDER

- ¶ 1 *Held:* Defendant showed no plain error in the trial court's admission of allegedly improper gang evidence: the evidence of defendant's gang membership was not closely balanced, and the alleged error was not structural.
- ¶ 2 Following a jury trial, defendant, Erik Esparza, was convicted of several offenses, including unlawful possession of a firearm by a street-gang member (720 ILCS 5/24-1.8(a)(1) (West 2014)), and he was sentenced to nine years' imprisonment. At issue in this appeal is whether defendant has established that it was plain error for the court to allow an expert in gang activity to testify about a telephone conversation defendant had with an unidentified woman,

wherein defendant was asked about his “little king brothers.” We conclude that he has not. Accordingly, we affirm.

¶ 3

I. BACKGROUND

¶ 4 At trial, evidence was presented concerning how someone is identified as belonging to a gang. For example, the evidence revealed that the police use nine criteria in making such an identification. These include self identification, having gang tattoos, wearing gang jewelry, shouting gang slogans, displaying gang hand signals, wearing gang colors, associating with other gang members, hanging out in an area known to belong to a gang, and any other information about gang involvement received from a reliable source. Once an individual is considered a gang member, he remains a gang member, as there is no “downgrade.” This is true even when a member is considered inactive, because, among other things, the Latin Kings’ constitution provides “once a King, always a King.”

¶ 5 The evidence also revealed that two gang conglomerates are found in Aurora, which is where defendant committed his crimes. These are the Folk Nation and the People Nation. The Latin Kings are a faction of the People Nation. Members of the Latin Kings wear yellow and black or gold and black. They also wear red and black, which are considered the gang’s “war” colors, and they wear baseball hats turned to the left. The evidence revealed that it is very dangerous for an individual to wear Latin King colors around gang members without being a member of the gang. To rise in the ranks of the Latin Kings, members commit violent crimes, including shooting rival gang members. Once members show their dedication to the gang by committing such acts, they can get gang tattoos. Common Latin King tattoos include a lion, a king, “LK,” a five-point crown, or five dots. The evidence revealed that it is very dangerous for a person to have Latin King tattoos without first receiving permission from the gang.

¶ 6 Evidence concerning the crimes defendant committed revealed that, on July 11, 2015, Aurora police officers were working undercover in a neighborhood known to be within Folk Nation territory. At around 7 p.m. that night, officers observed defendant, Martin Garcia, Caleb Frazier, and Rene Muro in a car driving slowly around this neighborhood.¹ Although they at times might have denied it, Garcia, Frazier, and Muro were known by the police to be members of the Latin Kings.

¶ 7 After the police spotted the men that night, Muro and defendant, who were both armed with guns, took off running. All four were eventually apprehended.

¶ 8 The officers involved in arresting the men described what they were wearing. Frazier was wearing a black T-shirt and a black, yellow, and white baseball hat. The bill of the baseball hat was turned to the left. Garcia was wearing a black shirt and red and black shoes. Defendant, like Garcia, was wearing a black T-shirt and red and black shoes.

¶ 9 After defendant was arrested, the police discovered several tattoos on his body. These included a large black and yellow “L” on his left arm and a large black and yellow “K” on his right arm. Both were written in ornate lettering that gangs “very commonly” use. Defendant also had five dots, which were positioned like a five on a die, tattooed on his left wrist, which is “typically” how Latin King members position the five dots. No evidence was presented regarding when, where, or why defendant acquired these tattoos.

¶ 10 Police later searched the car in which defendant and the other men were seen. Found in that car were red and black gloves, black and yellow gloves, a prescription bottle with defendant’s name on it, and a black T-shirt with “Pirates” written in gold on the front. Members

¹ Muro, who was wearing a mask, was not identified until after he had abandoned the mask and attempted to climb a fence to elude the police.

of the Latin Kings wear Pittsburgh Pirates spirit wear because the team's colors are black and gold and the "P" stands for People Nation. When the police searched the area where Muro was apprehended, they discovered a black mask and red gloves. A black glove with yellow writing on it was also found.

¶ 11 When Officer Jeffrey Hahn, an expert in gang activity, began testifying about his familiarity with Frazier, defendant objected, arguing that the State failed to lay a proper foundation. During proceedings outside the presence of the jury regarding that objection, the State informed the court that it had turned over to defendant recordings of telephone conversations defendant had while he was in jail that were replete with references to gang activity. The State told the court that it "wasn't planning on getting into [the conversations] specifically because it's prejudicial." The court said that it would address the admissibility of that evidence if and when it was introduced. Defendant never objected.

¶ 12 After Hahn was qualified as an expert in gang activity and the court, over defendant's hearsay objection, ruled that Hahn could rely on information he received from gang files to formulate his opinions, the State, outside of the jury's presence, informed the court that it was going to ask Hahn about phone calls defendant made while in jail wherein defendant made "very direct references to his membership in the gang." Defendant never objected.

¶ 13 Thereafter, Hahn was asked about phone calls defendant made between July 11, 2015, and the beginning of January 2016. That exchange proceeded as follows:

"Q. And you listened to a phone call specifically that was made by the defendant on July 23rd of 2015?

A. I did.

Q. And in that phone call was he—was the defendant conversing with a woman?

A. Yes.

Q. And did that woman ask the defendant about his little king brothers talking to him?

A. Yes.”

¶ 14 At that point, defendant objected on the basis that there was “no foundation for ‘him’ being [defendant].” The court sustained the objection, and the State asked a series of questions in order to lay a proper foundation. Thereafter, the following exchange was had:

“Q. And in that phone call [on July 23, 2015], did the woman talking to the defendant ask him about his little king brothers?

A. Yes.

Q. And did she then go on to talk about them?

A. Yes.

Q. And did the defendant make affirmative responses to the woman?

A. He did.”

Defendant did not object to this testimony.

¶ 15 Immediately after this exchange, the State asked Hahn if, based on the information he testified to “today and yesterday,” he had an opinion regarding whether defendant was a member of a street gang on July 11, 2015. Hahn testified that he did and that his opinion was that defendant was a member of the Latin Kings. This opinion was based in part on the fact that defendant was with three other Latin King members on July 11, 2015; details of what transpired on that night that were contained in a report Hahn reviewed; and the fact that defendant and Muro were armed. Hahn testified that he reached this conclusion even though defendant had

asked the police to remove his name from active status in their gang files “because [defendant said] it’s unfortunate that he’s been labeled a gang member because of who he hangs out with.”

¶ 16 The jury found defendant guilty of, among other things, unlawful possession of a firearm by a street-gang member. Although defendant filed a posttrial motion, he never challenged the admission of the phone conversation he had about his “little king brothers.” The court denied the motion, and this timely appeal followed.

¶ 17

II. ANALYSIS

¶ 18 At issue in this appeal is whether defendant has established that it was plain error for the court to allow Hahn to testify about the phone conversation defendant had about his “little king brothers.” We consider whether defendant has established plain error, because defendant forfeited his claim by failing to raise it in the trial court. See *People v. Thompson*, 238 Ill. 2d 598, 611 (2010). The plain-error rule bypasses normal forfeiture principles and allows us to review unpreserved claims of error in certain circumstances. *Id.* at 613. Specifically, we may review unpreserved errors if a clear or obvious error occurred and (1) the evidence is so closely balanced that that error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) that error is so serious that it affected the fairness of the defendant’s trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence. *Id.*

¶ 19 The defendant bears the burden of establishing plain error. *People v. Johnson*, 238 Ill. 2d 478, 485 (2010). We review *de novo* whether plain error arose. *Id.*

¶ 20 Under a plain-error analysis, courts generally first determine whether any error occurred. *Thompson*, 238 Ill. 2d at 613. We will not do so here, because even if that testimony about the

phone conversation should not have been admitted, defendant has failed to establish plain error. See *People v. White*, 2011 IL 109689, ¶ 134; *People v. Garner*, 2016 IL App (1st) 141583, ¶ 32.

¶ 21 Defendant argues that his claim is reviewable under both prongs of the plain-error rule. Under the first prong, we consider whether “the evidence is so closely balanced that the guilty verdict may have resulted from the error.” *Thompson*, 238 Ill. 2d at 613. We cannot say that the evidence was so closely balanced here. That is, independent of the evidence regarding defendant’s phone conversation, the other evidence clearly established that defendant was a Latin King member.² Specifically, defendant admitted that he “hangs out” with gang members, and on July 11, 2015, defendant was with three other men who belonged to the Latin Kings. The men were driving around suspiciously in the area of a known rival gang. They had gang paraphernalia in the car, and they were wearing either the Latin Kings’ traditional gang colors or their “war” colors. Defendant, who was armed, was wearing the gang’s “war” colors. The evidence revealed that it is very dangerous to wear gang colors around gang members if one is not in the gang. Defendant also had several Latin King tattoos. These tattoos were very common among Latin King members. Associating with gang members, wearing gang colors, and having gang tattoos are all factors used to identify someone as belonging to a gang. Further, Hahn, an expert in gang activity, concluded that defendant was a gang member, never specifically indicating that his opinion was based on the phone conversation to which he listened.

¶ 22 Citing the fact that no evidence established when or why defendant got his tattoos and the fact that he told the police in 2010 that he wanted his name removed from the police department’s gang database, defendant claims that the evidence concerning whether he was a

² We consider only the evidence establishing defendant’s gang membership, as defendant does not dispute that the evidence established that he unlawfully possessed a gun.

gang member was closely balanced. We disagree. First, the evidence established that getting a Latin King tattoo is not something anyone can do on the spur of the moment. Rather, one can get such tattoos only after showing his dedication to the gang (by committing violent crimes) and getting permission from the gang. The evidence revealed that it is very dangerous for a non-member to have Latin King tattoos. Because defendant had several Latin King tattoos, the jury certainly could infer that defendant was a very dedicated member of the gang. Second, despite asking the police to declassify him as a gang member, defendant did nothing to distance himself from the Latin Kings. Moreover, the evidence revealed that, once someone joins the gang, he is considered a member for life. Given these facts, we fail to see how the evidence regarding defendant's gang membership was closely balanced.

¶ 23 Under the second prong of the plain-error rule, courts may review unpreserved "structural" errors. *Id.* at 613-14. Those are systematic errors that erode the integrity of the judicial process and severely undermine the fairness of a defendant's trial. *Id.* at 614. Errors that have been classified as "structural" include the total deprivation of the right to counsel or having a trial before a judge who is financially interested in a party's case. See *People v. Patterson*, 217 Ill. 2d 407, 424 (2005). The alleged error at issue here, *i.e.*, the admission of inadmissible evidence, is simply not that type of error. *Id.* (admission of grand jury testimony during trial was an error that occurred during the presentation of the case to the jury, not a structural defect in the trial itself). Thus, it is not reviewable under the second prong of the plain-error rule. See *People v. Williams*, 262 Ill. App. 3d 808, 819-20 (1994) (admission of lay witness's conclusory testimony regarding defendant's membership in a gang was not reviewable under second prong of plain-error rule).

¶ 24 Because we determine that defendant’s argument concerning the statement about his “little king brothers” is not reviewable under the plain-error rule, we need not consider defendant’s claim that that error was compounded when the court instructed the jury pursuant to Illinois Pattern Jury Instructions, Criminal, Nos. 3.06-3.07 (4th ed. 2000).

¶ 25

III. CONCLUSION

¶ 26 For the reasons stated, we affirm the judgment of the circuit court of Kane County. As part of our judgment, we grant the State’s request that defendant be assessed \$50 as costs for this appeal. 55 ILCS 5/4-2002(a) (West 2016); see also *People v. Nicholls*, 71 Ill. 2d 166, 178 (1978).

¶ 27 Affirmed.