2013 IL App (1st) 093334-U

SIXTH DIVISION
February 8, 2013

No. 1-09-3334

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IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County
	)	
v.	)	No. 06 CR 21861
	)	
NAKIYA MORAN,	)	Honorable
	)	Michele M. Simmons,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE REYES delivered the judgment of the court.
Presiding Justice Lampkin and Justice R. Gordon concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's convictions are affirmed where the trial court did not err in refusing to consider scholarly articles defendant submitted in support of his motion *in limine*; defendant was not prejudiced by defense counsel's failure to sufficiently question the venire about gang bias during *voir dire* and in his failure to move to strike police testimony about defendant; and, defendant further was not prejudiced by

the prosecutor's comment in closing argument about his gang membership.

¶ 2 Following a jury trial, defendant Nakiya Moran was found guilty of five counts of attempt murder and two counts of aggravated battery with a firearm and was sentenced to a total of 62 years in prison. On appeal, defendant contends: (1) the trial court erred when it refused to consider scholarly articles regarding the unreliability of eyewitness identification; (2) his trial counsel was ineffective for failing to sufficiently question potential jurors regarding gang bias during *voir dire*; (3) and his trial counsel was ineffective for failing to request the court to strike Detective Kevin Rapacz's testimony that defendant was well known within the police department; and, (4) the prosecutor's comment in closing argument that defendant was a "decorated" Latin King was improper and prejudicial. For the following reasons, we affirm the judgment of the trial court.

¶ 3 Background

¶ 4 The victims, Tomas Rostro and his daughter Yadira Rostro, were shot while outside their home in Calumet City, on August 22, 2006. At trial, Tomas testified that at 9 p.m., he was outside his home with his wife Flora and their two sons Eduardo and Edwin and their daughter Yadira when he heard gunshots. He grabbed his son Edwin and his wife and pushed them to the ground and then felt something hit him in the back. He looked to where his daughter Yadira had been standing and saw her on the ground. She yelled, "dad, I'm shot." He looked across the street and observed a person shooting. He approached the area where the shooter was located but the shooter ran down the alley. Tomas ran back towards his daughter and called paramedics. He

stated the area where the shooter had been standing was well-lit.

¶ 5 Eduardo Rostro testified that right before the shooting he observed defendant "peep his head out from the alley - - from a bush that was in the alley." Defendant then pulled out a gun and started shooting. There was a street light near defendant that lit up the area and there was also a light from a nearby garage. Eduardo testified over defense counsel's objection that he was "one hundred percent sure" defendant was the shooter. Eduardo had known defendant since the fifth grade and at the time of the shooting, Eduardo was a junior in high school. On cross-examination, Eduardo denied being a member of a gang. He had planned to become a Latin King several weeks before the shooting but ultimately did not join. Earlier that evening he had been playing basketball outside his home with a friend, Kimothy Hill, and heard a vehicle with a loud muffler driving around the neighborhood. He also noticed the vehicle after the shooting, but did not see who was in the vehicle. On redirect examination, Eduardo testified that some of his friends were Latin Kings, and he knew defendant to be a Latin Dragon. The Latin Kings and Latin Dragons had "confrontations" with one another in the past. Eduardo had been friends with defendant but they ceased being friends when defendant began associating with the Latin Kings.

¶ 6 Yadira Rostro testified that she was 16 years old at the time of the shooting. On the evening in question, she heard gunshots and fell to the ground. She observed the gunfire coming from across the street by a garage and some bushes. Yadira identified defendant as the shooter and had known defendant since she was in the second grade. Defendant and her brother Eduardo had attended school together. The area was well-lit and there was a light from the garage near defendant and nothing obstructed her view. She identified defendant in a photo array after she

was taken to the hospital and told officers defendant's name. On cross-examination, Yadira testified she saw defendant's face "perfectly fine" and she "knew who it was" and had "no doubt in [her] mind."

¶ 7 For the defense, Amber Mendoza testified that at the time of the shooting, she had known defendant for several months. Defendant had been at her house on the day of the shooting until about 9 p.m. when her mother drove defendant home. Mendoza testified that she and Elizabeth Outlaw went with Mendoza's mother to drive defendant home and defendant was dropped off at about 9:10 p.m. Mendoza acknowledged defendant associated with members of the Latin Dragons but did not know whether he was a member. She further testified that Eduardo was a member of the Latin Kings as were Tomas and Edwin.

¶ 8 Elizabeth Outlaw also testified that she had known defendant for about 10 years. On the day of the shooting defendant was at Mendoza's house until about 9 p.m. when Mendoza's mother drove him home. Outlaw testified she remained at Mendoza's home when defendant was driven home. Outlaw was not affiliated with the Latin Dragons and denied knowing any gang signs. She did not know whether defendant was a member of the Latin Dragons. Outlaw was later impeached with the introduction of a photograph of her, Mendoza and other friends making the Latin Dragon gang sign.

¶ 9 William Moran, defendant's father, testified defendant had to be home by 9 p.m. every night and on the evening of the shooting, he was home at 9 p.m.

¶ 10 Kimothy Hill testified that on the night of the shooting, he was outside the Rostro's home. He left prior to the shooting, and as he departed, he heard a vehicle with a loud muffler drive by.

One of the individuals in the vehicle flashed the two-six gang sign, which is a rival gang of the Latin Kings. When he arrived at his friend's home, which was a few blocks from the Rostro's home, he heard gunshots and then heard the vehicle with the loud muffler again. Hill had known defendant for approximately four or five years and they had attended school together. Hill admitted he used to be affiliated with the Gangster Disciples, but stopped several years ago. He knew Eduardo and Edwin to be affiliated with a gang.

¶ 11 In rebuttal, the State called Sergeant Urbanek of the Calumet City police department. Sergeant Urbanek testified that he was familiar with the numerous gangs in Calumet City and the two-six gang did not have a presence there.

¶ 12 Analysis

¶ 13 Motion *In Limine*

¶ 14 On appeal, defendant first contends that the trial court abused its discretion when it refused to consider scholarly articles defendant submitted in support of his motion *in limine* to "Exclude Testimony As To Degree Of Certainty Of Identification." Defendant essentially sought to exclude the testimony of witnesses that would testify to a high degree of certainty that defendant was the shooter. Defendant asked the court to consider two journal articles regarding the unreliability of eyewitness identification in support of his motion. The court permitted defendant to argue that the articles were relevant to explain the lack of correlation between the degree of certainty of an identification and the validity of an identification. The court refused to consider the articles, finding that they were not relevant and were not binding or persuasive on the court. The court then denied the motion. Defendant maintains on appeal that the trial court

erred in failing to consider the articles he submitted in support of his motion.

¶ 15 The grant or denial of a motion *in limine* is an evidentiary ruling that we review for an abuse of discretion. *People v. Kirchner*, 194 Ill. 2d 502, 539-40 (2000). A trial court abuses its discretion when its decision is arbitrary, fanciful, unreasonable, or no reasonable person would adopt the view taken by the court. *People v. Morgan*, 197 Ill. 2d 404, 455 (2001). Accordingly, absent an abuse of discretion, we will not disturb a trial court's ruling on a motion *in limine*.

¶ 16 Here, the trial court's refusal to consider the articles defendant submitted in support of his motion was not an abuse of discretion. The trial court stated it considered the case law defendant submitted in support of his motion, but would not consider the articles because they were not relevant and were not persuasive or binding on the court. We agree with the trial court that the articles were not relevant to the court's determination as to whether to grant the motion. The court properly considered the case law defendant submitted with his motion before ruling on the motion. We cannot say the court's decision to refuse to consider the articles was arbitrary or unreasonable, and defendant cannot point to any case law suggesting otherwise.

¶ 17 Defendant cites *People v. Allen*, 376 Ill. App. 3d 511 (2007), however, we find it distinguishable. In *Allen*, a single eye-witness identified the defendant as the perpetrator who entered her place of business, pulled out a handgun and demanded money, and then shot her in the back when she turned around to retrieve money from the cash register. *Allen*, 376 Ill. App. 3d at 513. The eye-witness had not previously known the defendant. The defendant sought to present expert testimony regarding the unreliability of eyewitness identification, especially in high-stress situations where a weapon is involved. The trial court denied the defendant's request

without balancing the probative value of the evidence against any potential unfairly prejudicial effect. This court held the trial court abused its discretion because the court failed to conduct a meaningful inquiry into the expert's proposed testimony when the specific circumstances of the eye-witnesses' identification warranted it. *Allen*, 376 Ill. App. 3d at 526.

¶ 18 Here, unlike in *Allen*, defendant did not seek to present the testimony of an expert witness, rather, he sought to submit articles to the court. We do not find the two circumstances analogous. Further, the trial court did permit defendant to argue the articles relevancy but refused to read the articles or admit them into evidence because the admission would have been improper under the rules of evidence. *People v. Tolefree*, 2011 IL Ap (1st) 100689, ¶30 (2011). Additionally, in contrast to *Allen*, defendant was identified as the shooter by both Eduardo and Yadira, who had known defendant for many years. We are not persuaded by defendant's reliance on *Allen* and find no abuse of discretion.

¶ 19 Ineffective Assistance of Counsel

¶ 20 Defendant next contends his trial counsel was ineffective for failing to sufficiently question potential jurors regarding gang bias during *voir dire*. A defendant claiming ineffective assistance of counsel must establish that counsel's performance was deficient in that it fell below an objective standard of reasonableness and that but for defense counsel's deficient performance, there is a reasonable probability that the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668 (1984); *People v. Albanese*, 104 Ill. 2d 504, 525 (1984). The failure to satisfy either prong of this test precludes a finding of ineffective assistance of counsel. *Strickland*, 466 U.S. at 697; *Albanese*, 104 Ill. 2d at 525.

¶ 21 Defendant specifically argues his trial counsel was ineffective for failing to "compromise" with the trial court regarding the wording of counsel's proposed *voir dire* questions regarding gang bias. Prior to *voir dire*, defendant tendered several proposed questions regarding gang bias he wanted the court to pose to prospective jurors. There was no objection to defendant's first question and the court included the following question in *voir dire*:

> "[w]hether he or she or any member of his or her family or any of his or her close friends is now or ever has been a member in a gang or has participated in the activities of a gang, and if so, what gang they are or were a member of or what gang their family member or close friend is or was a member of."

The proposed questions the court denied were:

> "[w]hether they discussed gang activity with [a person they knew to be in a gang] and what they were told?
>
> [w]hether, if they learned that a witness is or was the member of a gang it would make it impossible for the juror to believe the witness?
>
> [w]hether, if they believed that a crime was gang related, they would be prone to convict a person that was accused of a crime even if the evidence was insufficient?
>
> [w]hether or not they would automatically believe the testimony of an ordinary citizen or police officer over that of an alleged gang member?"

With regards to the last question, the court proposed instead to ask jurors the question "[w]ould you be able to assess the credibility of a police officer the same or different than that of an

ordinary citizen *or alleged gang members* that may testify." However, counsel rejected the court's proposed question. Neither defendant's question nor the court's question with the suggested additional language was presented during *voir dire*. Defendant argues that counsel was ineffective for failing to agree to the court's proposed question and defendant was prejudiced because jurors were not properly questioned about their potential for gang bias.

¶ 22 The trial court is given the primary responsibility of conducting the *voir dire* examination, and the extent and scope of the examination rests within its discretion. *People v. Terrell*, 185 Ill. 2d 467, 484 (1998). The purpose of *voir dire* is to ascertain sufficient information about prospective jurors' beliefs and opinions so as to allow removal of those members of the venire whose minds are so closed by bias and prejudice that they cannot apply the law as instructed in accordance with their oath. *People v. Cloutier*, 156 Ill. 2d 483, 495-96 (1993).

¶ 23 Our supreme court has previously recognized that street gangs are regarded with considerable disfavor by other segments of our society. *People v. Gonzalez*, 142 Ill. 2d 481, 489 (1991). When testimony regarding gang membership and gang-related activity is to be an integral part of the defendant's trial, the defendant must be afforded an opportunity to question the prospective jurors, either directly or through questions submitted to the trial court, concerning gang bias. *Strain*, 194 Ill. 2d at 477.

¶ 24 There can be no ineffective assistance of counsel because there is no reasonable probability that the result of the proceeding would have been different had defense counsel asked jurors the court's proposed question. The jury heard testimony from both Eduardo and Yadira

that they had known defendant for many years and they identified him as the person shooting at them from across the street. Numerous witnesses also testified that there were street lights and a garage light near where defendant was standing that illuminated the area. The jury further heard several defense witnesses testify that defendant was elsewhere at the time of the shooting, however, the jury did not find the testimony credible. Defendant's theory throughout trial was that this was a case of mistaken identity. Nevertheless, the jury concluded that the witness testimony identifying defendant was sufficient to establish defendant's identity beyond a reasonable doubt. Although there was evidence and testimony that the shooting may have been gang related, we find no support for defendant's contention that the result of the proceedings would have been different had defense counsel used the court's proposed *voir dire* questions. In fact, the jury found Eduardo and Yadira's testimony credible despite Eduardo's admission that he had been affiliated with a gang only when he was younger and, despite defense witnesses characterization of most of the Rostro family as gang members.

¶ 25 Defendant relies on *People v. Strain*, 194 Ill. 2d 467 (2001), contending that his first proposed question, which was the only question asked about gang bias, has been held to be insufficient to determine possible gang bias. In *Strain*, our supreme court held that since the prospective jurors were only asked whether they or any member of their families had ever had any involvement with street gangs, that single question was insufficient under the facts of the case to determine gang bias. *Strain*, 194 Ill. 2d at 480. The court noted a prospective juror "may have had no direct or indirect involvement with gangs, yet be biased against gang members or hold a negative opinion on the subject of gangs." *Strain*, 194 Ill. 2d at 480. The court further

noted that gang-related testimony was pervasive throughout the trial and the State's opening and closing arguments reminded the jurors of the importance of gang testimony at trial. *Strain*, 194 Ill. 2d at 479. Here, in contrast, the focus of the testimony and evidence at trial concerned the identity of the shooter and evidence of gang membership was minimal.

¶ 26 Defendant further contends his trial counsel was ineffective for failing to ask the court to strike Detective Kevin Rapacz's testimony that defendant was well known within the police department. Defense counsel questioned Detective Rapacz on cross-examination about information officers received from the victims about the shooter. Detective Rapacz testified he did not distribute a report about the shooter's height or weight because "the fact that [defendant] was mentioned as a suspect from [that] point forward, everyone within our department pretty much knows and is familiar with [defendant]." Defendant maintains defense counsel's failure to move to strike the testimony amounted to ineffective assistance of counsel and defendant was prejudiced because the evidence was closely balanced.

¶ 27 Again there can be no ineffective assistance of counsel because there is no reasonable probability the result of the proceeding would have been different had defense counsel moved to strike Detective Rapacz's testimony. Even if defense counsel had moved to strike the testimony and even if the court had stricken the testimony, the evidence was not closely balanced. As stated above, the jury heard testimony from both Eduardo and Yadira that they had known defendant for many years and they were able to observe him from across the street in a well-lit area as the person who shot at them. Even though the jury heard defendant was known by police officers, defendant was positively and credibly identified by Eduardo and Yadira. Striking

Detective Rapacz's testimony would not have changed the result of the trial. The evidence was overwhelming because the identification of defendant as the shooter was supported by two eye-witnesses testimony. Since defendant cannot show prejudice, there cannot be ineffective assistance of counsel.

¶ 28 Prosecutor's Comment in Closing Argument

¶ 29 Lastly, defendant contends the prosecutor's comment in closing argument that defendant was a "decorated" Latin King was improper and prejudicial. During closing arguments the prosecutor argued to the jury:

> "Eduardo came in here, and he told you back on August 22, 2006, he was 17-years old, and he told you the truth from that witness stand. He told you at the time, he was a premature Latin King. He was trying to get involved with the gang, the Latin Kings, and he told you that. He also told you a while back, he and this defendant were friends. They used to be friends. This defendant used to go over to his house. But then, this defendant became a Latin Dragon. And as you heard from this trial, the Latin Dragons and the Latin Kings do not get along. They are rival gangs in the town of Calumet City, Cook County, Illinois. Well, this defendant was already a decorated Latin Dragon by the time Eduardo was trying to be a Latin King."

Defense counsel objected, and the trial court overruled the objection. The prosecutor further argued:

> "[t]his defendant was a decorated Latin Dragon. Make no mistake, he was a full

gang member on August 22, 2006."

Defendant maintains he was prejudiced by the prosecutor's comment that he was a "decorated" Latin Dragon because although there was testimony at trial that defendant was a member of the Latin Dragons, there was no testimony that he was a "decorated" member.

¶ 30 A prosecutor has wide latitude during closing argument. *People v. Wheeler*, 226 Ill. 2d 92, 121 (2007). When reviewing claims of prosecutorial misconduct in closing argument, a reviewing court will consider the entire closing arguments of both the prosecutor and the defense attorney, in order to place the remarks in context. *Wheeler*, 226 Ill. 2d at 122. In closing, a prosecutor may comment on the evidence and any fair, reasonable inferences it yields. *People v. Nicholas*, 218 Ill. 2d 104, 121 (2005). A State's closing argument will lead to reversal only if the prosecutor's remarks created "substantial prejudice." *Wheeler*, 226 Ill. 2d at 123. "Substantial prejudice" occurs "if the improper remarks constituted a material factor in a defendant's conviction." *Wheeler*, 226 Ill. 2d at 123. We acknowledge, as do the parties, that Illinois courts have applied both a *de novo* and abuse of discretion standard of review to closing argument issues. See *People v. Land*, 2011 IL App (1st) 101048, ¶149 (2011).

¶ 31 Here, regardless which standard of review is applied, we cannot say that defendant was prejudiced by the prosecutor's comment. Considering the entirety of the prosecutor's closing argument, and more specifically the paragraph in which the comment occurred, the prosecutor referred to Eduardo as a "premature" gang member and defendant as a "full gang member" or "decorated" gang member. When read in this context, the prosecutor's comment referred to defendant's status as a gang member rather than any type of rank or leadership role within the

gang. As defendant points out, the testimony at trial indicated only that defendant was a gang member and there was no further testimony regarding his status or rank within the gang. Considering the evidence adduced at trial and the context in which the comment was made, it only referred to defendant's status as a gang member. Defendant's identity as the shooter was established through the eye-witness testimony of Eduardo and Yadira. Even if the comment was improper, the prosecutor's comment was not a material factor in defendant's conviction.

¶ 32 Conclusion

¶ 33 Accordingly, the judgment of the trial court is affirmed.

¶ 34 Affirmed.