

No. 1-12-3567

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

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

| | | |
|--------------------------------------|---|-------------------|
| THE PEOPLE OF THE STATE OF ILLINOIS, |) | Appeal from the |
| |) | Circuit Court of |
| Plaintiff-Appellee, |) | Cook County. |
| |) | |
| v. |) | No. 11 CR 20361 |
| |) | |
| ANIBAL DeJESUS, |) | Honorable |
| |) | Nicholas R. Ford, |
| Defendant-Appellant. |) | Judge Presiding. |

JUSTICE ROCHFORD delivered the judgment of the court.
Presiding Justice Hoffman and Justice Lampkin concurred in the judgment.

O R D E R

¶ 1 *Held:* Defendant did not establish plain error nor ineffectiveness of counsel for trial counsel's failure to object to the admission of gang-related testimony which was relevant and admissible in establishing defendant's motive for possessing a gun and corroborative of his confession.

¶ 2 Following a 2012 jury trial, defendant Anibal DeJesus, was convicted of being an armed habitual criminal (720 ILCS 5/24-1.7(a) (West 2010)), and of possession of cannabis (720 ILCS 550/4(d) (West 2010)). Defendant was sentenced to concurrent terms of 10 years' imprisonment for the armed habitual criminal conviction, and 2 years' imprisonment for the possession of cannabis conviction, and was ordered to pay \$1,434 in fines, fees, and costs. On appeal,

defendant contends he did not receive a fair trial because the State improperly introduced irrelevant gang evidence which suggested he had a propensity to commit the crimes in question, and that the improper admission of that evidence constituted plain error to be reviewed despite the absence of counsel's objections or, in the alternative, his counsel was ineffective in failing to object to the gang-related evidence. We affirm defendant's convictions and sentences, but order the fines and fees order corrected.

¶ 3 On October 29, 2011, at about 3 p.m., a Chicago police gang crimes unit responded to a report of a shooting at 1722 North Kimball Avenue in Chicago. Upon entering the residence, the police observed Anthony Cruz, a member of the Latin Kings street gang who had been shot in the foot. In a bedroom, officers recovered 69 small plastic bags containing a substance later determined to be cannabis and a handgun. The police arrested defendant outside the residence after he admitted the items belonged to him. After his arrest, defendant confessed that he was holding the gun at the request of a member of the Latin Kings.

¶ 4 Prior to trial, the State made an oral motion *in limine* to introduce gang evidence as relevant to defendant's confession. The State explained to the court that another gang-related shooting had taken place a few days before this incident and, as a result, defendant had been asked "to hold a gun" which had been used in that prior shooting. The State also sought to introduce evidence that gang members were present at the residence as relevant to the officers' investigation and to explain why the police, in securing the scene, entered the bedroom.

¶ 5 Defense counsel responded that the prior shooting had no relation to defendant's confession and evidence relating to that shooting should not be admitted. Defense counsel also

argued that the prejudicial effect of evidence that gang members were in the house at the time of the incident greatly outweighed its probative value.

¶ 6 The trial court found the evidence relating to the October 29, 2011, shooting was admissible for purposes of explaining why police were at the residence. The trial court also found admissible defendant's statement that he was asked, as a member of the gang, to hold the gun for another gang member as it would explain that "the nature of the social relationship" between defendant and this other person was "predicated on gang membership." However, the trial court excluded both the evidence relating to the presence of gang members in the house as more prejudicial than probative and the evidence as to the prior shooting as not relevant.

¶ 7 At the start of defendant's trial, the prosecution made an opening statement that began as follows:

"This, ladies and gentlemen of the jury, is Anibal DeJesus. He is a member of a street gang in the city of Chicago. He is a member of the Latin Kings street gang. He lives and breathes guns, drugs and what both of those things breed, violence. Throughout the course of this trial, you are going to learn a little bit about the Latin Kings street gang."

¶ 8 Officer Junkovic testified that on October 20, 2011, at about 3 p.m., he and other members of a gang enforcement unit were assigned to investigate a shooting at 1722 North Kimball Avenue. Upon arriving at the two-unit apartment building located at that address, he observed 10 people outside. He entered the first-floor apartment living room which was occupied by 10 more people, including Anthony Cruz, who had been shot in the right foot. Officers Junkovic, Corona, and a third officer tried to clear the apartment of people "because it was a

crime scene." Officer Junkovic described the recovery of the weapon and drugs from the bedroom and that the room contained clothing suitable for an "extremely large" man.¹ The officers also saw prescription bottles which bore defendant's name and address of 1722 North Kimball Avenue.

¶ 9 As the officers left the apartment building, they encountered defendant "on the sidewalk at the stairs of the apartment building." Upon being told the officers recovered the drugs and the gun, defendant stated: "The pistol and the weed in the bedroom is mine, just please keep my girl out of it." Defendant's girlfriend was one of the apartment's tenants. After his arrest and receiving his *Miranda* rights, defendant gave a statement at the police station to Officers Junkovic and Corona that he had been given the gun a few days before to hold for "the Nation," which Officer Junkovic understood to mean the Latin Kings street gang.

¶ 10 On cross-examination, Officer Junkovic stated that there were 10 people throughout the entire apartment and he had no idea if the weapon and the drugs were placed in the bedroom by someone else. Officer Junkovic acknowledged his arrest report did not state that he found clothing suitable for a large man, or prescription bottles with defendant's name and address printed on the label in the bedroom where the contraband was discovered.

¶ 11 Officer Corona testified he served on a gang enforcement unit designed to "gather information on the gangs" and said he had specialized knowledge about the Latin Kings. Officer Corona said Humboldt Park Latin Kings controlled the area from Western Avenue to Central Park Avenue, and from Chicago Avenue to Armitage Avenue. The State asked Officer Corona

¹ According to the arrest report contained in the record, defendant was 6-feet-1-inch tall and weighed 250 pounds at the time of the arrest.

about the Latin Kings' hierarchy, and Officer Corona responded that within those boundaries, a different leader or "Inca" would control an intersection, and other gang members held other roles such as "enforcer" and "foot soldier."

¶ 12 Officer Corona's testimony continued as follows:

"[Assistant State' Attorney (ASA):] You said the word, Inca. What is an Inca?

A. Inca would be the highest position for that – for the Latin Kings.

Q. And are you familiar with the Inca for the area of Humboldt Park?

A. It is sort of up for debate. There is no true Inca.

Q. Why is that?

A. The constant conflicts and people going to jail.

Q. Are you familiar with who the enemies of the Latin Kings street gang are?

A. Yes.

Q. And who are they?

A. For that particular set, they have different ones. For that particular set would be the Imperial Gangsters. They have the Maniac Latin Disciples, and they were in conflict at that time with the Dragons as well.

Q. What are the colors of the Latin Kings street gang?

A. Black and yellow.

Q. Are there any other identifiers?

A. They use the lion, the crowns. That is some of the things they use.

Q. Are there specific signs that members of the Latin Kings use?

A. Yes.

Q. Are you familiar with those?

A. Yes.

Q. Would you be able to demonstrate those for the members of the jury?

A. Yes.

[Defense Counsel]: Object to relevancy.

THE COURT: Sustained. I will ask you to move on.

[ASA]: Are you familiar with the Latin Kings street gang that is in the area of Kimball and Wabansia?

A. Yes.

Q. And are you familiar with an individual by the name of Anibal DeJesus?

A. Yes.

Q. Do you see Anibal DeJesus in court today?

A. Yes.

Q. Would you point out something he is wearing?

A. Subject wearing the purple collared shirt.

THE COURT: Record will reflect the in-court identification of the defendant.

[ASA]: Do you know him to be a member of the Latin Kings street gang?

A. Yes.

Q. How?

A. I have arrested him, contact carded him.

[Defense Counsel]: Objection.

THE COURT: Sustained. Folks, you can consider the allegations in this present case and then obviously the officer's knowledge of the defendant, and I have talked to you about gang membership. In and of itself it is not evidence of guilt or innocence. It can explain the actions of the person, but mere gang membership is not enough to say absent other evidence [of] guilt or innocence. Everybody understand?

[ASA]: Beyond what you have testified to, are there other capacities in which you have seen Anibal DeJesus acting as a member of the Latin Kings street gang?

A. Yes.

Q. Which capacities?

A. I observed him on the public way hanging out with other gang members. I have observed him in the colors of the Latin Kings. I have observed him flashing signs of the Latin Kings and yelling gang slogans as well as in my past.

Q. Have you had an opportunity to ask him if he is in fact a Latin King gang member?

A. Yes.

Q. And he has told you that he was?

A. Yes.

[Defense Counsel]: Objection.

THE COURT: Overruled."

¶ 13 The prosecutor then asked Officer Corona about the events which led to defendant's arrest. Officer Corona said the person who was shot in the foot was known as "Bolo," an enforcer in the Latin Kings street gang and that defendant was a soldier. Officer Corona testified

an enforcer "is going to go out there and shoot" and is "the muscle behind the gang," while a soldier is a "person that will be out there selling narcotics" and who "could hold a gun."

¶ 14 Officer Corona said he recovered and removed the ammunition from a handgun found on top of a dresser in the bedroom where Officer Junkovic was searching. He also testified to observing defendant's prescription bottles on the dresser. When he and Officer Junkovic encountered defendant outside the residence, Officer Corona told defendant they had recovered "weed" and a gun, Officer Corona's testimony as to defendant's response was consistent with Officer Junkovic's testimony.

¶ 15 Officer Corona testified that after being read his *Miranda* rights, defendant stated he was given the gun a couple of weeks earlier to hold for the "Nation." Officer Corona explained that the Nation was the "criminal organization of the Latin Kings." When asked by the prosecutor why defendant would do that, Officer Corona testified as follows:

"OFFICER CORONA: From my past experience, they hold a gun – the guns are constantly moved for purposes of if there is some violence, and if they are suppose[d] to retaliate, they want to keep that gun close –

[Defense Counsel]: Judge, I will object to speculation.

THE COURT: Overruled.

OFFICER CORONA: They will keep the gun close to the area. They will need it for protection of to use it against somebody. They constantly move it so the police officers do not – if we execute a search warrant we won't recover one of the guns."

¶ 16 On cross-examination, Officer Corona stated he never saw defendant inside the apartment where the gun and the drugs had been found. He said there was clothing suitable for a larger-

sized man in the bedroom. In contrast to his statement on direct examination, Officer Corona clarified defendant had said he was given the gun a few days and not a few weeks prior to his arrest.

¶ 17 The parties stipulated that defendant had been convicted of two or more qualifying felony offenses under the Armed Habitual Criminal Act (720 ILCS 5/24-1.7(a) (West 2010)). The parties also stipulated that the plastic bags recovered from the bedroom contained 1,008.6 grams of cannabis. The defense presented no evidence. In closing argument, the State noted defendant's statement to police, that he was holding the gun for the Nation, and remarked that it "makes complete sense as [defendant] is a gang member, and he is just doing his job as a gang member."

¶ 18 The jury convicted defendant of being an armed habitual criminal and of the possession of cannabis. Prior to sentencing, defense counsel filed a motion for a new trial, which included a general reference to preserving any issues objected to at trial. That motion for a new trial was denied. Defendant was subject to Class X sentencing due to his three prior felony convictions. The trial court sentenced him to 10 years in prison for the armed habitual criminal conviction and 2 years for the possession of cannabis, with those sentences to be served concurrently.

¶ 19 On appeal, defendant argues the trial court allowed the State to introduce prejudicial, irrelevant gang-related evidence and that the detailed testimony of Officer Corona as to the Latin Kings' boundaries, hierarchy, rivals, colors, symbols, and defendant's status as a Latin King, suggested that defendant had a propensity to commit violence.

¶ 20 "Evidence that a defendant is a member of a gang must be admitted with care because gangs are regarded with considerable disfavor by our society." *People v. Morales*, 2012 IL App

(1st) 101911, ¶ 40. Nevertheless, the "accused may not insulate the trier of fact from his gang membership where it is relevant to a determination of the case, simply because prejudice attaches to that revelation." *People v. Rivera*, 145 Ill. App. 3d 609, 618 (1986). Evidence that 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). Such evidence can be admitted to show a common purpose or design or to provide a motive for an otherwise inexplicable act. *People v. Roman*, 2013 IL App (1st) 110882, ¶ 24.

¶ 21 Moreover, as with any other type of evidence, evidence of gang membership is admissible if it qualifies as relevant. *People v. Johnson*, 208 Ill. 2d 53, 102 (2003). "Relevant evidence is defined as evidence having any tendency to make the existence of a fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." *People v. Gonzalez*, 142 Ill. 2d 481, 487-88 (1991).

¶ 22 The State asserts that defendant forfeited his ability to complain about the introduction of the gang evidence in this case. Defendant responds he preserved his claims by objecting to the admission of the gang evidence at several stages, such as opposing the State's motion *in limine*, raising objections during trial, and including the issue in his motion for a new trial.

¶ 23 Defendant's posttrial motion concluded with the assertion: "Defendant will stand on his objections throughout the trial in which [the trial judge] improperly overruled as a basis for a new trial and preserves all of those objections for appeal purposes." Such generalities in a posttrial motion are insufficient to preserve defendant's claims for review. See *People v. Moss*, 205 Ill. 2d 139, 168 (2001) (defendant's arguments were not preserved for appeal by a general

allegation in posttrial motion that the prosecutor made prejudicial, inflammatory, and erroneous statements in closing argument).

¶ 24 Despite this forfeiture, defendant argues the issue can be reviewed under either prong of the plain-error doctrine, or as a claim of ineffectiveness of his trial counsel. The plain-error doctrine allows a reviewing court to consider unpreserved issues where the evidence is so closely balanced that the error alone severely threatened to tip the scales of justice against the defendant (*People v. Herron*, 215 Ill. 2d 167, 186-87 (2005)), or the error was so serious that it affected the fairness of the proceeding and challenged the integrity of the judicial process where the error affected a defendant's substantial rights. *Id.* at 187. In any event, a defendant must preliminarily establish there was error. *Id.*

¶ 25 As to the first prong of plain error, that analysis has been found similar to the test used in considering a claim of ineffectiveness of counsel based on evidentiary error. See *People v. White*, 2011 IL 109689, ¶ 133. Under both analyses, the defendant must show he was prejudiced, either because that the guilty verdict may have been caused by the alleged error or because there was a "reasonable probability" of a different result had the evidence in question been excluded. *Id.*; see also *Strickland v. Washington*, 466 U.S. 668, 694 (1984). Thus, to prevail under plain error or ineffectiveness of counsel in this case, defendant must show the evidence was so closely balanced that the gang evidence impermissibly led to his convictions.

¶ 26 Officer Corona testified he knew defendant as a Latin King. The jury also was told that: (1) the police were responding to a shooting on the day of defendant's arrest; (2) defendant had been asked as a gang member to hold a gun by another member of the gang; (3) defendant told Officer Corona at an unspecified time that he was a Latin King; and (4) the Latin Kings

constantly move guns to hide them from police. The jury also learned: (5) the territorial boundaries of the Latin Kings in Humboldt Park; (6) a description of the Latin Kings organization and hierarchy; (7) the Latin Kings' colors, identifiers, and rival gangs; and (8) defendant's role as a "soldier" (selling drugs, acting as a lookout, holding a gun) in the gang.

¶ 27 Prior to trial, the trial court allowed into evidence defendant's statement that he was asked to hold the gun for another gang member to show the social relationship between defendant and the person for whom he was holding the gun. Such evidence was relevant to defendant's possible motive for being in possession of a gun—the crux of the offense of being an armed habitual criminal and properly admitted. See, e.g., *People v. Resendez*, 273 Ill. App. 3d 751, 759 (1995) (gang-related evidence relevant to provide motive for crime). In presenting its motion *in limine*, the State asserted that evidence of defendant's gang affiliation was relevant to corroborate his admission to police that he was holding a gun for the "Nation." The other evidence—that defendant was a member of the Latin Kings street gang and had been observed wearing gang colors and flashing signs, how and why gangs moved guns, the hierarchy and geographical territory of the gang—did corroborate his confession and his reasons for holding the gun and was correctly admitted.

¶ 28 In addition, even if there was error in the admission of any of the gang evidence, the first prong of the plain-error doctrine requires that the evidence in the case must be closely balanced. Defendant admitted to possessing the gun and the cannabis recovered in the room. The officers also discovered in the bedroom men's clothing which would have fit defendant and prescription drugs with defendant's name and address. Defendant was found outside at the bottom of the steps as the officers were leaving the residence. The evidence in this case was not closely

balanced. Furthermore, the trial court advised the jury that it could consider defendant's gang affiliation to explain his actions, but not as proof of his guilt.

¶ 29 Therefore, defendant has not established error or prejudice under the first prong of the plain-error doctrine, or that his counsel was ineffective.

¶ 30 Defendant asserts the gang-related evidence heard by the jury in this case is comparable to the evidence found improper in *People v. Mason*, 274 Ill. App. 3d 715 (1995). In *Mason*, the defendant was convicted of murdering a fellow member of the Gangster Disciples. *Id.* at 717. In addition to testifying to a shared gang affiliation, a Chicago police officer was allowed to testify as to 24 different points which related to the larger gang structure in Chicago, including the leaders of various gangs, the meaning of gang signs, graffiti, clothing and tattoos, and the roles of certain members. *Id.* at 720-21. This court held that the evidence was irrelevant and inflammatory, given that the defendant and the victim had a common gang affiliation and the extensive testimony as to the Gangster Disciples did not relate to the defendant's possible motive for shooting the victim. *Id.* at 722. In addition, the State introduced prejudicial and irrelevant testimony as to the defendant's status as a "regent" in the Gangster Disciples and photographs of the defendant's tattoos which depicted gang symbols. *Id.* at 723. This court held that admission of that irrelevant gang-related evidence did not constitute harmless error and that the defendant was denied a fair trial. *Id.* at 725.

¶ 31 The gang-related evidence testimony in *Mason* was more extensive than that in the instant case, and much of the evidence admitted in *Mason*, including details about gang rivalries, did not relate to a motive in the shooting because the defendant and the victim were members of the same gang. *Id.* at 722. Here, although the jury heard evidence that defendant was a soldier

for the Latin Kings whose job was to hold weapons, the jury also heard testimony that a gun was recovered from a room which also contained prescription bottles bearing defendant's name, and clothing that would fit defendant, and defendant admitted to police that the weapon and drugs belonged to him. We do not find the inflammatory gang-related evidence found in *Mason* is comparable to the gang-related evidence offered here.

¶ 32 Defendant further argues that the improper admission of the gang-related evidence met the second prong of the plain-error doctrine as it was highly prejudicial and deprived him of a fair trial before an impartial jury. The second prong of a plain-error analysis is equated with structural error which requires automatic reversal. *People v. Thompson*, 238 Ill. 2d 598, 613-14 (2010). Although our supreme court noted in *Thompson* that a trial by a biased jury would satisfy the second prong of plain-error analysis, the trial court held that the defendant, who had the burden of persuasion on this issue, presented no evidence that the jury was biased there. *Id.* at 614. The same conclusion is true here. Even if there was error in the admission of any of the gang-related evidence, we cannot presume the jury convicted defendant on the basis of his gang affiliation, and not on the evidence that he had a gun in his possession and the requisite prior convictions to establish the offense of being an armed habitual criminal, or that he had cannabis in his possession.

¶ 33 Defendant's remaining arguments relate to the fines and fees imposed against him. First he contends, and the State correctly concedes, that several of those charges were erroneously imposed and should be vacated, specifically: \$100 for the Methamphetamine Law Enforcement Fund (730 ILCS 5/5-9-1.1-5(b) (West 2010)); \$25 for the Methamphetamine Drug Traffic Prevention Fund (730 ILCS 5/9-1.1-5(c) (West 2010)); \$25 for the Drug Traffic Prevention Fund

(730 ILCS 5/5-9-1.1(e) (West 2010)); and two assessments for \$2 each listed on his fines and fees order without statutory authority.

¶ 34 Defendant further asserts, and the State again correctly agrees, that the following charges should be offset by the \$5-per-day credit which defendant is due for time served: the \$10 Mental Health Court fine (55 ILCS 5/5-1101(d-5) (West 2010)); the \$5 Youth Diversion/Peer Court fine (55 ILCS 5/5-1101(e) (West 2010)); the \$30 Children's Advocacy Center fine (55 ILCS 5/5-1101(f-5) (West 2010)); the \$30 fine to fund juvenile expungement (730 ILCS 5/5-9-1.17 (West 2010)); and the \$500 controlled substance fine (720 ILCS 570/411.2(a)(4) (West 2010)).

¶ 35 Accordingly, the parties correctly agree that the original amount of \$1,434 which was assessed against defendant should be reduced by \$734, for a revised total of \$700 in costs.

¶ 36 Pursuant to Illinois Supreme Court Rule 615(b)(2) (Ill. S. Ct. R. 615(b)(2) (eff. Aug. 27, 1999)), the clerk of the circuit court is directed to vacate those fines and fees listed in ¶ 33 of this order, offset those fines listed in ¶ 34 of this order by defendant's time-served credit, and correct the fines and fees order to reflect a total of \$700. The judgment of the circuit court is affirmed in all other respects.

¶ 37 Affirmed; fines and fees order corrected.