

SIXTH DIVISION
March 20, 2015

No. 1-13-0905

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 7827
)	
ROBERT EVANS,)	Honorable
)	Matthew E. Coghlan,
Defendant-Appellant.)	Judge Presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Justices Hall and Rochford concurred in the judgment.

O R D E R

¶ 1 **Held:** Defendant's statement that he carried a gun to protect family members from a rival gang faction was relevant and admissible, despite its indication of defendant's own gang affiliation. Defendant's possession of a gun was the gravamen of the charged offense, and the defense's theory was that defendant did not have a weapon in his possession.

¶ 2 Following a jury trial in 2012, defendant Robert Evans was convicted of being an armed habitual criminal (720 ILCS 5/24-1.7(a) (West 2010)) and of resisting or obstructing a police officer (720 ILCS 5/31-1(a-7) (West 2010)). Defendant was sentenced to concurrent terms of

nine years and three years in prison for those offenses and was ordered to pay various fines and fees. On appeal, defendant contends that the trial court abused its discretion in allowing the State to introduce evidence that he was an active member of a gang and was engaged in a dispute with another faction of that gang at the time of the offenses. He further argues that two charges imposed against him should be offset by the \$5-per-day credit for time spent in custody prior to sentencing. We affirm defendant's convictions but order that the mittimus be corrected.

¶ 3 Prior to trial, the State moved *in limine* to introduce defendant's statement to Chicago police detective Matthew Benigno that he was a member of the Four Corner Hustlers Street Gang and was carrying the gun because a different subgroup of that gang had threatened his son, Robert Evans, Jr., and his nephew, Marcus Brown. The prosecution argued defendant's statement was relevant because it indicated his reason for carrying the gun and further asserted the evidence was more probative than prejudicial. The court ruled that defendant's statement would be admitted as proof of his "motive and intent." The court stated that before Benigno testified as to the statement, it would give a limiting instruction to the jury that it should only consider defendant's statement for that purpose.

¶ 4 Chicago police officer Paul Urban testified that he and officer Doug Eng were working as tactical officers at about 5 p.m. on April 23, 2011, when they received a radio call of a man with a gun. The suspect was described as a black male wearing a red T-shirt and red hat and standing near a white van in the area of Lake and Parkside.

¶ 5 After arriving at that area, Urban observed a man fitting that description and identified him in court as defendant. Urban testified that defendant looked in his direction, then turned away and walked toward a barber shop. Urban stopped his vehicle near the barber shop and approached defendant, who stood inside the shop's doorway. After defendant extended a hand

toward the officer, Urban reached toward defendant's back. Urban testified he was performing a protective pat-down to determine if defendant was carrying a weapon. Urban felt a hard object on defendant's side, and defendant started to run away. After a struggle during which a taser gun was used on defendant, a loaded handgun was recovered from defendant's pants pocket. The gun was entered into evidence.

¶ 6 Chicago police officer Michael Walsh testified he was at the scene and inventoried the weapon and ammunition recovered from defendant. Walsh was present when defendant was read his *Miranda* rights at approximately 6:25 p.m. According to Walsh, defendant told police his brother was killed in the area about a year ago, and he had the gun for the protection of his son and nephew.

¶ 7 Detective Benigno testified that he advised defendant of his *Miranda* rights at about 7 p.m. and defendant agreed to "have a conversation." The trial judge advised the jury that "evidence is about to be received that the defendant has been involved in conduct other than that charged in the information." The court further stated:

"This evidence will be received on the issue of the defendant's motive and intent and may be considered by you only for that limited purpose. It is for you to determine whether the defendant was involved in that conduct and, if so, what weight should be given to this evidence on the issue of motive and intent."

¶ 8 After that admonition, Benigno testified defendant said he was a member of the Four Corner Hustlers "from Lake and Central" and was in possession of a handgun because the Four Corner Hustlers "from Lake and Pine" had threatened Robert Jr. and Brown.

¶ 9 Certified statements of defendant's prior qualifying felony convictions were entered into evidence, specifically a 1998 conviction for possession of a controlled substance with intent to deliver and a 2009 conviction for possession of cannabis with intent to deliver. The State rested.

¶ 10 For the defense, Charles Henderson testified that he was at the barber shop between 3:30 and 4 p.m. that day, and he and defendant spoke to Robert Jr. there. Robert Jr. was with some friends. Defendant followed Robert Jr. outside the shop and they spoke further.

¶ 11 Defendant testified he was at home preparing for a family party in honor of his late brother when he received a phone call from Henderson about Robert Jr., who was then 16 years old. Defendant went to the barber shop to meet his son, who was standing outside the shop.

¶ 12 Defendant said he was about to ask his son if he had a gun when police arrived. When he learned his son had a gun, he told his son to place the gun on top of a car tire temporarily. Defendant said that due to his status as a convicted felon, he did not want to be near the gun. Defendant said he "just wanted [the gun] out of my son's hands" because his son and nephew had "prior arrests in the area." Defendant went into the barber shop to distance himself from the gun and because he "wanted a haircut anyway" due to the family party. Defendant planned to "deal with the gun situation once the police left."

¶ 13 Defendant said an officer asked him if his son was Robert Evans. The officer tried to grab defendant's hands, and defendant saw that a group of youths had been detained down the street. Another officer approached, and a taser gun was fired at defendant. Defendant testified he was never searched and a handgun was not recovered from him. He did not know how the police obtained the gun that he had told his son to put on the tire. Defendant denied telling Walsh, Benigno or any other officer that he was carrying a handgun.

¶ 14 On cross-examination, defendant denied receiving a phone call that some gang members were after Robert Jr. When asked if the party coincided with the anniversary of his brother's death, defendant responded his brother's death was not gang-related. Defendant said there was no need for him to retaliate against anyone to defend his brother, son or nephew.

¶ 15 The jury was read, *inter alia*, a pattern instruction that evidence was received that defendant had been involved in conduct other than that charged in the information, and that evidence may be considered by the jury only for the limited purpose of the issues of defendant's motive and intent. The instruction further stated it was for the jury to determine whether defendant was involved in that conduct and the weight to be given that evidence on the issues of motive and intent.

¶ 16 In closing and rebuttal closing arguments, the prosecution referred to defendant's statement to Benigno. The jury convicted defendant of being an armed habitual criminal and of resisting or obstructing a police officer.

¶ 17 On appeal, defendant contends he was deprived of a fair trial by the introduction of his statement that he was a member of the Four Corner Hustlers and had a gun because a different division of that gang threatened his son and Brown. He argues the prejudicial impact of that evidence greatly outweighed its probative value because his motive and intent could have been established solely through his testimony that he carried the weapon to protect his family members. Therefore, defendant asserts that his admission that he carried a gun should have been allowed into evidence without any reference to gang activity. The State responds that defendant's statement was admissible as probative of his intent and motive for possessing a handgun on the day of the offense.

¶ 18 "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. Evidence that a defendant is a gang member 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).

¶ 19 As a general rule, evidence of gang affiliation "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." *Johnson*, 208 Ill. 2d at 102. Relevant evidence is defined as evidence "having any tendency to make the existence of a fact that is of consequence to a determination of the action more or less probable than it would be without the evidence." *People v. Patterson*, 192 Ill. 2d 93, 115 (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; *People v. Smith*, 141 Ill. 2d 40, 58 (1990).

¶ 20 As with other evidentiary rulings, a trial court's rulings with respect to gang-related evidence are reviewed for an abuse of discretion. *People v. Johnson*, 208 Ill. 2d 53, 102 (2003). This deferential standard requires the defendant to show that the trial court's decision to allow the evidence was arbitrary, fanciful or unreasonable or that no reasonable person would have taken the view adopted by the trial court. *People v. Patterson*, 2014 IL 115102, ¶ 114.

¶ 21 In the instant case, to prove defendant guilty of being an armed habitual criminal, the prosecution was required to show, in addition to prior convictions of two qualifying felonies, that defendant was in possession of a firearm. See 720 ILCS 5/24-1.7(a) (West 2010). Therefore, the jury needed to determine, as an element of the offense, whether defendant had a weapon in his possession.

¶ 22 Defendant's statement to Detective Benigno was relevant to the main issue in dispute in this case, *i.e.*, whether defendant was in possession of a gun. In opening statements, defense counsel asserted that a reasonable doubt existed that defendant had a gun on his person. The State introduced defendant's admission that he was carrying a gun because a rival faction of his gang threatened his son and nephew. Defendant subsequently testified that he did not have possession of a gun during these events and that he had no basis to harm anyone to defend his son, nephew or his late brother.

¶ 23 Defendant's statement to Detective Benigno directly contradicted his trial testimony that he was not in possession of a gun. Defendant's admission that he had the gun to protect his son and nephew from other members of his own gang was relevant to explain an otherwise inexplicable act: why he undertook the admitted risk of carrying a weapon given his status as a convicted felon. Although defendant contends his admission to the gun possession could have been introduced without reference to his gang status, his stated reason for carrying the weapon, namely, to protect his family members from gang members, was relevant to explain the disputed question of possession and to counter his trial testimony that he had no basis to have a gun for purposes of retaliation. Defendant's statement to the detective that he had a gun to protect against gang activity made it more probable that he was in possession of a gun, which was the key fact at issue.

¶ 24 We further note that relevant gang-related evidence is not to be excluded simply because it is prejudicial; rather, its prejudicial effect must substantially outweigh the evidence's probative value. See *People v. Jaimes*, 2014 IL App (2d) 121368, ¶ 54; *Johnson*, 208 Ill. 2d at 102. Stated another way, an accused cannot prevent his gang membership from being admitted "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); see also *People v. Wilder*, 325 Ill. App. 3d 987, 992 (2001).

¶ 25 Defendant compares this case to *Roman*, in which this court found the admission of gang-related evidence constituted reversible error. *Roman*, 2013 IL App (1st) 110882, ¶ 37. However, the extent of the gang evidence introduced in that case far exceeded the evidence presented here. In *Roman*, the State introduced, among other evidence, pictures of the defendant's tattoos and elicited testimony from a police detective that the defendant was a member of the Latin Kings gang; however, no witness mentioned tattoos as relevant to an identification of the defendant. *Id.* at ¶¶ 29-30. Moreover, the jurors at Roman's trial did not receive an instruction as to the limited purpose of the gang evidence. *Id.* at ¶ 33. Here, defendant's statement that he had a gun to protect his son and nephew from members of a different faction of his gang was relevant to defendant's motive for being in possession of a gun, which is the basis of the offense of being an armed habitual criminal.

¶ 26 In conclusion on this point, the trial court did not abuse its discretion by admitting into evidence defendant's statement to police that he carried a gun on the day of the offense to protect his family members from members of his own gang.

¶ 27 Defendant's remaining contentions involve the classifications of two charges imposed at sentencing and their ability to be offset by the \$5-per-day presentence incarceration credit. An offender who has been assessed one or more fines is entitled to a credit of \$5 per day for time spent in custody as a result of the offense for which the sentence was imposed. 725 ILCS 5/110-14(a) (West 2010). The record reflects that defendant was assessed \$550 in various fines, fees and charges and spent 627 days in custody prior to his sentencing. Therefore, defendant asserts,

and the State does not dispute, that a total of \$3,135 in credit is available to be applied to the fines assessed against him.

¶ 28 This credit applies only to "fines" imposed for a conviction, and not to other fees or costs. *People v. Pittman*, 2014 IL App (1st) 123499, ¶ 41. A "fine" is a charge that is punitive in nature and is not intended to compensate the State for costs incurred in prosecuting the defendant, but is instead meant to finance the court system. *People v. Breeden*, 2014 IL App (4th) 121049, ¶ 83. Questions regarding the appropriateness of fines, fees and costs imposed by a sentencing court are reviewed *de novo*. *People v. Ackerman*, 2014 IL App (3d) 120585, ¶ 26.

¶ 29 First, defendant argues the \$50 Court System fee imposed under section 5-1101(c)(1) of the Counties Code (55 ILCS 5/5-1101(c)(1) (West 2010)) is a fine to be offset by the \$5-per-day credit. The State responds that charge is a fee that compensates Cook County "for a small portion of the cost of maintaining a court system."

¶ 30 In addressing the various charges included in section 5-1101 of the Counties Code, our supreme court held in *People v. Graves*, 235 Ill. 2d 244, 253 (2009), that the charges in that statute represent "monetary penalties to be paid by a defendant" who pleads or is found guilty of certain offenses. See also *People v. Smith*, 2013 IL App 2d 120691, ¶ 21 (noting that *Graves* refers to the charge imposed under section 5-1101(c) as a "fine" and determines that it meets the criteria for a fine). Although the State argues in this appeal that *Smith* was wrongly decided and "should not be followed," we find no basis to depart from its reliance upon *Graves*. This court also has adopted the analysis in *Graves* and found that the charges imposed under section 5-1101 are fines in *People v. Smith*, 2014 IL App (4th) 121118, ¶ 54, *Ackerman*, 2014 IL App (3d) 120585, ¶ 30, and *People v. Wynn*, 2013 IL App (2d) 120575, ¶ 17. In line with that authority, we hold that the \$50 Court System fee imposed under section 5-1101(c) is, in fact, a fine to

which defendant can apply the monetary credit he received for time spent in presentence custody.

¶ 31 Defendant next contends, and the State correctly agrees, that the \$15 State Police Operations charge (705 ILCS 105/27.3a (1.5) (West 2010)), is also a fine and therefore subject to such an offset because that charge does not reimburse the State for costs incurred in defendant's prosecution. See *People v. Millsap*, 2012 IL (4th) 110668, ¶ 31; see also *Wynn*, 2013 IL App (2d) 120575, ¶ 13. Therefore, both the \$50 Court System charge and the \$15 State Police Operations charge are fines that may be satisfied by a portion of defendant's presentence custody credit. Because this court has the authority to modify the trial court's sentencing order without remanding the case (see Supreme Court Rule 615(b)(1) (134 Ill. 2d R. 615(b)(1) (eff. May 1, 2007))), we modify the trial court's order to reflect that defendant is entitled to credit toward those charges.

¶ 32 Accordingly, for all of the foregoing reasons, the judgment of the trial court is affirmed as modified.

¶ 33 Affirmed as modified.