NO. 4-09-0418

IN THE APPELLATE COURT Filed 1/27/11

OF ILLINOIS

FOURTH DISTRICT

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. THESIS D. JONES, Defendant-Appellant.	)))))))	Appeal from Circuit Court of Macon County No. 07CF462 Honorable Scott B. Diamond, Judge Presiding.

JUSTICE POPE delivered the judgment of the court.
Justices Steigmann and Appleton concurred in the judgment.

ORDER

Held: The trial court did not abuse its discretion when it deferred its ruling on defendant's motion *in limine* to exclude evidence of gang activity until the start of trial because it did not limit defendant's ability to question potential jurors during *voir dire* regarding their views toward gangs.

In April 2009, a jury convicted defendant, Thesis D. Jones, of first degree murder (720 ILCS 5/9-1(a)(1) (West 2006)). In May 2009, the trial court sentenced defendant to 45 years' imprisonment.

Defendant appeals, arguing the trial court abused its discretion when it deferred its ruling on defendant's motion *in limine* to exclude evidence of gang activity. We affirm.

I. BACKGROUND

As the parties are familiar with the facts, and because

the issues in this appeal do not concern the facts of defendant's underlying conviction, we mention them here only as necessary to resolve the issue raised on appeal.

On April 9, 2007, defendant was charged with first degree murder. The victim was shot and killed during what appeared to be a drive-by shooting.

Prior to trial, defendant filed a motion *in limine* seeking to bar evidence relating to gang activity. Defendant argued gang evidence was not admissible because the group defendant was alleged to be a member of, the "Goon Squad," was not a gang as defined by section 10 of the Illinois Streetgang Terrorism Omnibus Prevention Act (Act) (740 ILCS 147/10 (West 2006)). Defendant also argued

> "there is no indication that the shooting of [the victim] was provoked by gang activity. Rather[,] the shooting was sparked by violence between a small number of individuals who just happened to be from another gang; there is no indication of gang-sanctioned activity. Secondly, the evidence shows that the [']Mob Squad['] and the ['Goon] Squad['] were no longer 'at war' with one another, so it is logical to assume that gang affiliation was not the basis for the

violence. Third, there is no evidence [the victim] was a member of either gang, and there is nothing in the evidence to indicate [the victim] was a target for a gang-related shooting. To allow the jury to hear evidence of gang activity would lead the panel to draw conclusions that the evidence does not support, which would result in substantial prejudice to [defendant], and this substantial prejudice far outweighs the probative value based on the evidence."

Prior to *voir dire*, the trial court heard arguments on defendant's motion. The State argued (1) the definition of a gang under the Act did not limit the evidence and (2) there was no requirement the victim be a target of gang violence for the admissibility of gang evidence.

Defendant responded, arguing the term "gang" was too strong to describe three friends who hung out and were not in a gang. Defendant also stated he would not object to the use of the word "group" in place of the term "gang." However, the State objected, stating "this is gang activity and we can't label it something it's not." The following colloquy then took place:

"THE COURT: All right. Well, I will take the motion under advisement[,] and I

will see if I can read up on it tonight[,] and then we will address it, but I think we can pick the jury, but with no references to 'gang'. You got any problems with that?

MR. SCOTT: No. That's fine.

THE COURT: You got any problems, Mrs. Root?

MRS. ROOT [(defendant's attorney)]: The only problem with that, Judge, is we can't question with respect to gang bias.

THE COURT: Well, until I hear the evidence, I don't know how, if you want to open the door, that's up to you. But I am not prepared to rule on it just having been given this and having not had an opportunity to read the cases.

MRS. ROOT: I understand.

THE COURT: The People have agreed they won't mention gangs. If you want to open the door, that's up to you

MRS. ROOT: Okay."

During *voir dire* the following colloquy took place between defendant's trial counsel and the first group of prospective jurors:

"Q. [MRS. ROOT:] Have any of you ever been involved in any groups, not necessarily now, but even when you were young? Did you run with a group, a clique, or something like that? Ms. Baltimore?

A. [JUROR BALTIMORE:] No.

Q. No[?] Not a member of some sort of group?

A. Well, I was in choir and that kind of thing.

Q. Okay. That's fine. Ms. Cheney?

A. [JUROR CHENEY:] Softball teams growing up.

Q. Okay. Ms. Hockaday?

A. [JUROR HOCKADAY:] No.

Q. Mr. Hilligoss?

A. [JUROR HILLIGOSS:] Just with friends.

Q. Okay. Well, when you say with friends, was this a group of friends who all ran together?

A. Yes.

Q. Did you have a name?

A. No.

Q. If you hear testimony regarding

groups of people who run together, is that going to create a negative or problematic connotation for any of you?

A. (Jurors answer in the negative.)"

The following exchange took place between defendant's counsel and the second panel of prospective jurors:

"Q. [MRS. ROOT:] Do any of you have a memory or have any of your children had occasion as they were growing up to run around with a group of people or a clique?

A. (Jurors answer in the negative.)

Q. No? No experience with that, Mr. Riley?

A. [JUROR RILEY:] No."

Defendant's counsel posed the following questions to the third panel as follows:

"Q. [MRS. ROOT:] As you were growing up or in your adult life or in the lives of your children, did you or they ever run with groups, associate with cliques, that kind of thing?

A. (Jurors answer in the negative.)

Q. No?

A. [JUROR BINDER:] Mine would be in

sports as well.

Q. I'm sorry?

A. Mine was sports, sports activities.

Q. Okay. Is there anything about the association of people in groups that creates a negative connotation for you or that would influence you if you heard that in this case?

A. No.

Q. Ms. Whiteman?

A. [JUROR WHITEMAN:] No.

Q. Ms. Binder?

A. [JUROR BINDER:] No.

Q. Mr. Wingard?

A. [JUROR WINGARD:] No.

Q. Mr. Beckham?

A. [JUROR BECKHAM:] No."

In addition, defendant's counsel asked another prospective juror whether she had ever run with a crowd or belonged to a clique or a group of people. The juror indicated she had not. Defendant accepted her, but the State excused her.

Prior to opening statements, the trial court heard additional arguments and denied defendant's motion *in limine*. However, it told the State it would "have to connect it up [and] show that [defendant] is involved" and not just put on gang

testimony.

On April 24, 2009, the jury convicted defendant of first degree murder.

On May 22, 2009, defendant filed a motion for judgment notwithstanding the verdict, or, in the alternative, a new trial, alleging, *inter alia*, the trial court abused its discretion when it failed to rule on the defendant's motion to exclude gang evidence prior to *voir dire*.

On May 29, 2009, the trial court denied defendant's motion for a new trial and sentenced defendant to 25 years' imprisonment for first degree murder and applied a mandatory 20-year enhancement because defendant personally discharged a firearm during the commission of the offense. See 730 ILCS 5/5-8-1(a)(d)(ii) (West 2006).

This appeal followed.

II. ANALYSIS

On appeal, defendant argues the trial court abused its discretion when it failed to rule on his motion to preclude evidence of gang activity in a timely manner. Specifically, defendant contends the court's error prevented his trial counsel from fully questioning potential jurors about their attitudes toward gangs, which limited his ability to strike jurors who exhibited an anti-gang bias. Defendant maintains the court's failure deprived him of his right to a fair and impartial jury.

"[E]videntiary motions, such as motions *in limine*, are directed to the trial court's discretion, and reviewing courts will not disturb a trial court's evidentiary ruling absent an abuse of discretion." *People v. Harvey*, 211 Ill. 2d 368, 392, 813 N.E.2d 181, 196 (2004). "An abuse of discretion will be found only where the trial court's ruling is arbitrary, fanciful, unreasonable, or where no reasonable person would take the view adopted by the trial court." *People v. Hall*, 195 Ill. 2d 1, 20, 743 N.E.2d 126, 138 (2000).

We note defendant does not challenge the trial court's denial of his motion *in limine*. Instead, defendant confines his argument on appeal to whether the court abused its discretion by *deferring* its ruling until the start of trial. Defendant maintains the deferral caused him to limit his *voir dire* questioning and prevented him from properly investigating an important area of potential juror bias.

Our supreme court recently reasserted "'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.'" *People v. Sanders*, 238 Ill. 2d 391, 400, ___ N.E.2d ___, ___ (2010) (quoting *People v. Strain*, 194 Ill. 2d 467, 477, 742 N.E.2d 315, 321 (2000)).

In *Strain*, the appellate court found the trial court committed error in refusing the questions submitted by the defendant that probed for gang bias. *Strain*, 194 Ill. 2d at 481, 742 N.E.2d at 323. The supreme court affirmed, holding "[t]he trial court was required to conduct *voir dire* in a manner to assure the selection of an impartial panel of jurors, free from bias and prejudice." *Strain*, 194 Ill. 2d at 481, 742 N.E.2d at 323. The supreme court found defendant was denied an intelligent and informed basis on which to assert peremptory challenges or challenges for cause because the trial court refused to probe for gang bias. *Strain*, 194 Ill. 2d at 481, 742 N.E.2d at 323.

In this case, however, the trial court did not issue an order preventing defendant's *voir dire* questioning regarding gang bias. In addition, the court did not limit the scope of defendant's questions or refuse to pose questions submitted by defendant's counsel. The court's reservation of its ruling did not make it impermissible for defendant to question potential jurors regarding their views toward gangs. Defendant's counsel *chose* not to question potential jurors about their views toward gang activity. Defendant instead posed questions concerning cliques and groups.

During *voir dire* defendant's trial counsel asked prospective jurors (1) if they had ever been involved in any groups, even when they were young, (2) whether they ran with any

groups or cliques, and (3) whether testimony regarding groups of people who run together would create a negative connotation for them. Defendant's counsel also asked the venire if their children ran with a group or a clique and whether anything about the association of people in groups would influence their view of the case.

Defendant maintains he did not want to risk asking about jurors' attitudes toward gangs in the event his motion was granted. However, the supreme court has held a defendant must take the risk that the disputed evidence may be admitted before the issue can even be reviewed for error. See *People v. Patrick*, 233 Ill. 2d 62, 77, 908 N.E.2d 1, 10 (2009) (holding the trial court's blanket policy of deferring rulings on motions *in limine* to exclude prior convictions until after the defendant has testified was unreviewable where the defendant chose not to testify); see also *People v. Averett*, 237 Ill. 2d 1, 12, 927 N.E.2d 1191, 1197-98 (2010) (finding error in a blanket rule of deferring judgment but no relief where the defendants were not prevented from or limited in presenting evidence). By not taking the opportunity to inquire into the venire's attitudes toward gang activity, defendant here has little to complain of. See *People v. Carter*, 208 Ill. 2d 309, 319, 802 N.E.2d 1185, 1190 (2003) (a defendant may not proceed in one manner and then later on appeal argue the course of action was in error).

In this case, defendant's motion questioned whether he and his friends constituted a gang under the Act. The trial court's decision to allow or deny gang-related evidence would significantly impact the evidence presented at trial. Both parties presented conflicting arguments as to the requirements of the Act. Under these circumstances, it was not only reasonable but also prudent for the court to defer its ruling until it had a chance to read the cited cases and research the issue further.

We note this is not a case where the trial court waited until after the trial commenced or after the defendant testified to rule on defendant's motion *in limine*. See *Strain*, 194 Ill. 2d at 481, 742 N.E.2d at 323; see also *Patrick*, 233 Ill. 2d at 77, 908 N.E.2d at 10. Instead, the court ruled on the motion prior to the start of trial and thus prior to the introduction of any evidence. We also note defendant's counsel did not ask for a continuance to afford the court an opportunity to rule on the motion prior to *voir dire*. Most important, there is no evidence in the record to show the trial court's decision to reserve its ruling caused a biased or impartial juror to remain on the jury.

III. CONCLUSION

For the reasons stated, we affirm the trial court's judgment. As part of our judgment, we grant the State its statutory assessment of $50 against defendant as costs of this appeal.

Affirmed.