

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CALEB JAMES BEARUP,

Defendant-Appellant.

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UNPUBLISHED

July 20, 2001

No. 216870

Genesee Circuit Court

LC No. 98-002595-FC

Before: Gage, P.J., and Fitzgerald and Markey, JJ.

PER CURIAM.

Defendant appeals by right his jury convictions for assault with intent to commit murder, MCL 750.83, carrying a concealed weapon, MCL 750.227, and possession of a firearm during the commission of a felony, MCL 750.227b. We reverse and remand for proceedings consistent with this opinion.

Defendant first argues that the trial court erred when it did not specifically instruct the jury that it must be unanimous in its findings of guilt regarding which charge or charges constituted the assault for which defendant was convicted. We agree. Although defendant failed to object to the jury instructions, we conclude that defendant's substantial rights were affected by the plain error and reversal is required because the error seriously affected the integrity of the proceedings. *People v Carines*, 460 Mich 750, 763, 774; 597 NW2d 130 (1999).

Defendant was originally charged with assault with intent to commit murder against one victim. On the last day of trial, the prosecutor amended the information to include another count of assault with intent to commit murder against another person at the scene. The jury was instructed that it could find defendant guilty of assault to commit murder on the first victim, "and/or" the second, without instructing the jury that it must find unanimously on one, the other, or both.

This Court reviews trial court jury instructions de novo. *People v Reid*, 233 Mich App 457, 466; 592 NW2d 767 (1999). Criminal defendants are guaranteed a unanimous jury verdict. Const 1963, art 1, § 14; MCR 6.410(B); *People v Cooks*, 446 Mich 503, 510-511; 521 NW2d 275 (1994). This case is analogous to *People v Quinn*, 219 Mich App 571, 576; 557 NW2d 151 (1996), where we held that "where either of the two separate charges could have been proved at trial, the case must be remanded to allow the prosecutor to retry the defendant on one charge, or

both separately.” See, also, *People v Yarger*, 193 Mich App 532, 537; 485 NW2d 119 (1992). In this case, defendant could have been found guilty of three different assaults with intent to commit murder against the two alleged victims. The jury returned a verdict of guilty without determining which theory or victim was unanimously agreed on, if any. Therefore, this case must be reversed and remanded to the trial court, for the prosecutor to determine under which theories and for which victims the prosecutor wishes to prosecute.

While not dispositive based on our ruling above, we address the issue of gang affiliation because it may arise again at retrial. This Court reviews decisions on the admission of evidence for an abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). Defendant argues that gang affiliation was irrelevant and unduly prejudicial. We agree.

MRE 403 provides: “Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” “Relevant” evidence is “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” MRE 401. We note preliminarily that gang affiliation evidence is by nature highly prejudicial. See *People v Gearn*s, 457 Mich 170, 218-219 (Cavanagh, J., concurring in part and dissenting in part); 577 NW2d 422 (1998), overruled on other grounds in *People v Lukity*, 460 Mich 484, 494; 596 NW2d 607 (1999). The prosecutor repeatedly made reference to defendant’s alleged gang membership, arguing that it was relevant to motive. However, no testimony was elicited that the shootings in question were in any way gang-related. All the testimony pointed to other motives for the shooting. Therefore, we find that in this case, the evidence of gang affiliation was more inherently prejudicial than probative. This is consistent with our holding in *People v Wells*, 102 Mich App 122, 128-129; 302 NW2d 196 (1980), where we held that there must be some connection between the alleged gang affiliation and the defendant’s conduct. The prosecutor has failed to show any such relation.

Finally, defendant argues that the trial court improperly allowed testimony that defendant had told a third party that the victim should be careful because defendant had shot someone else in the past. Defendant argues that this was improper bad acts evidence under MRE 404(b)(1). We disagree. This was defendant’s own statement, and as such, can be used against him. Regardless of the prohibition against hearsay, there is general agreement that the prosecution may introduce relevant out-of-court admissions made by the defendant. McCormick, Evidence (4<sup>th</sup> ed), § 144, p 225. The statement was an admission by a party opponent under MRE 801(d)(2)(A), rather than evidence of prior acts under MRE 404(b)(1). MRE 801(d)(2)(a) provides that a statement is not hearsay if it is “offered against a party and is . . . the party’s own statement, in either an individual or a representative capacity . . . .”

In light of our decision to reverse, we need not address defendant's remaining arguments.

We reverse and remand for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Hilda R. Gage  
/s/ E. Thomas Fitzgerald  
/s/ Jane E. Markey