

IN THE UTAH COURT OF APPEALS

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State of Utah,)	MEMORANDUM DECISION
)	(Not For Official Publication)
Plaintiff and Appellee,)	
)	Case No. 20080509-CA
v.)	
)	F I L E D
Anthony David Milligan,)	(June 10, 2010)
)	
Defendant and Appellant.)	2010 UT App 152

Third District, Salt Lake Department, 061906304
The Honorable Paul G. Maughan

Attorneys: Herschel Bullen, Salt Lake City, for Appellant
Mark L. Shurtleff and Kris C. Leonard, Salt Lake
City, for Appellee

Before Judges Davis, McHugh, and Roth.

DAVIS, Presiding Judge:

Defendant Anthony David Milligan appeals his conviction and sentence for first degree felony murder and second degree felony possession of a firearm by a restricted person. He argues that the trial court failed to exclude gang-related evidence that was unfairly prejudicial to his case. We affirm.

The Utah Rules of Evidence provide that relevant evidence is generally admissible. See Utah R. Evid. 402. 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." Id. R. 401. "[T]he standard for determining the relevancy of evidence is very low, and even evidence with the slightest probative value is relevant." State v. Martin, 2002 UT 34, ¶ 34, 44 P.3d 805 (internal quotation marks omitted). Even relevant evidence, however, may not be admitted "if its probative value is substantially outweighed by the danger of unfair prejudice." Utah R. Evid. 403. "'Unfair prejudice' within its context means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." State v. Maurer, 770 P.2d 981, 984 (Utah 1989) (additional internal quotation marks omitted). "Determining questions of

relevance and the balancing of probative and prejudicial values are both tasks for which the trial court is granted discretion, and we will reverse the trial court's decision on these matters only when it abuses such discretion." State v. Schwenke, 2009 UT App 345, ¶ 9, 222 P.3d 768, cert. denied, No. 20100090, 2010 Utah LEXIS 87 (Utah Apr. 22, 2010).

Almost all of the evidence that Milligan challenges was relevant. There was testimony at trial that when the police arrived, the two witnesses tending to the shooting victim were running around in a state of panic, repeatedly yelling, "KMD did this." Thus, the evidence presented explaining that "KMD" referenced a gang, that Milligan belonged to that gang, that Milligan had several tattoos consistent with membership in that gang, and that Milligan's codefendant belonged to a different gang were all highly relevant, making it more probable that Milligan was the shooter. And any danger of unfair prejudice that may have resulted from the jury knowing Milligan's and his codefendant's gang affiliations¹ did not substantially outweigh the high probative value of the evidence.²

References to gang punishment for being a snitch and testimony that the codefendant had received threats and that his

¹It is also important to note that Milligan's defense was that his codefendant was responsible for the shooting. It is hard to fathom how knowing that both of them were involved in gangs would make the jury more likely to believe one story above the other or believe that only Milligan, and not the codefendant, "was simply a bad person" due to gang affiliation.

²The additional evidence that there were many gang members present at the party would certainly, as the State points out, help explain the escalation of events in this case. Specifically, the additional evidence explains why although only the codefendant was angry with the victim, other people from the party quickly surrounded the victim's car "like a mob" and were pounding on his windows, bouncing off his car, and yelling at him. Nonetheless, simply providing context does not meet the relevance standard. There is little about knowing that the other party-goers were gang members that makes any fact of consequence here more or less probable than it is without that information. Indeed, at most, knowing that many of Milligan's fellow gang members were present at the party would make it less probable that he was the "KMD" referred to as having killed the victim. Thus, any error in admitting this borderline irrelevant information was certainly harmless because knowing that other people at the party were members of gangs would not have been unfairly prejudicial to Milligan.

brother's house had been shot at twice as a result of the decision to testify were also relevant. The codefendant had at one point confessed to having participated in the shooting and was not initially entirely honest and forthcoming with police. The information regarding snitching explained the codefendant's fear of retribution and thus made him more believable despite the conflict between his initial and final characterizations of the pertinent events. And we do not see much danger of unfair prejudice to Milligan by presenting evidence relating to how gangs respond to snitches--certainly not enough danger of unfair prejudice that it would substantially outweigh the probative value of this evidence.

Finally, we do not agree with Milligan as to the testimony about the confrontation between Milligan and "Seven"--Milligan using the presence of his gun to warn Seven to take the punishment he had coming for a violation of gang rules.³ Milligan argues that such testimony was "gratuitous, unnecessary, and inextricably intertwined with the gang theme," suggesting that all testimony regarding the encounter should have been prohibited. However, the incident is highly relevant because it shows that Milligan had a gun matching the description of the murder weapon right before the murder occurred and makes it more probable that Milligan was the shooter. We nonetheless recognize that the information indicating that this confrontation was due to a gang rule violation was not relevant. But we do not see that the appropriate avoidance of this one reference to gangs would have, in light of the other evidence properly before the jury, had any likelihood of affecting the outcome of the proceedings. See generally Jones v. Cyprus Plateau Mining Corp., 944 P.2d 357, 360 (Utah 1997) ("Harmless errors are those that are sufficiently inconsequential so no reasonable likelihood exists that the error affected the outcome of the proceedings.").

³Milligan argues that the testimony relating to the confrontation with Seven was admitted in violation of the evidentiary rule regulating the admission of character evidence. Although "[e]vidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith," such evidence may nonetheless be admitted "for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Utah R. Evid. 404(b). The challenged evidence was admitted for the noncharacter purposes of showing intent and opportunity. Because Milligan makes no further analysis specific to this evidentiary rule in his opening brief, we simply address the underlying requirements of relevance and of probative value outweighing the danger of unfair prejudice.

In sum, although there may be some unfair prejudice inherent in making the jury aware of gang affiliation,⁴ we do not see that the introduction of such evidence here was an abuse of the trial court's discretion. This is particularly true where the court limited the presentation of gang evidence, giving the prosecutor only "a little leeway" in mentioning the gang-related evidence, admonishing the prosecutor "not to overplay this more than is necessary," and instructing the prosecutor to not "go too far." And the periodic references to gangs--the vast majority of which were proper--were of short duration and were spread out over three days of trial. While it may have been appropriate to limit such references even further, the trial court is in the best position to make that determination, and we defer to its decision absent an abuse of discretion. See Schwenke, 2009 UT App 345, ¶ 9 (stating that the task of balancing the probative and prejudicial values of evidence is a task for the trial court).

Further, we do not see that the gang evidence was improperly emphasized by the prosecutor. The prosecutor did state in her closing argument that "[t]his is a gang case," disagreeing with defense counsel's prior statement that simply because there was no gang rivalry behind the shooting, gangs were irrelevant to the case.⁵ But after this clarification, the prosecutor quickly

⁴Milligan presented no evidence below supporting his assertion that gang references clearly affect jury members, and no Utah precedent gives validity to such an assertion. However, other jurisdictions have noted the negative impact of such evidence. See, e.g., United States v. Harris, 587 F.3d 861, 867 (7th Cir. 2009) ("Evidence of gang membership can be inflammatory, with the danger being that it leads the jury to attach a propensity for committing crimes to defendants who are affiliated with gangs or that a jury's negative feelings toward gangs will influence its verdict. . . . For that reason, we have asked district courts to consider carefully whether to admit evidence of gang membership and gang activity in criminal prosecutions." (citation and internal quotation marks omitted)); United States v. Irvin, 87 F.3d 860, 864 (7th Cir. 1996) ("We have consistently held that, under appropriate circumstances, gang evidence has probative value warranting its admission over claims of prejudice. However, we have also long recognized the substantial risk of unfair prejudice attached to gang affiliation evidence" (citations omitted)).

⁵Defense counsel recognized in his closing argument that he was the one who initially made the assertion regarding whether this was a gang case: "I think that, as far as the gang involvement, and, you know, I realize I really was the person
(continued...)

moved on to discussing that the jury's job was to determine which individual was responsible for the victim's death. Under such circumstances, we see no abuse of discretion in the trial court's decision to admit the limited evidence related to gangs.

Affirmed.

James Z. Davis,
Presiding Judge

WE CONCUR:

Carolyn B. McHugh,
Associate Presiding Judge

Stephen L. Roth, Judge

⁵(...continued)
that did bring this kind of up to some extent in my opening statements."