

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIAM MARSHALL FORD,

Defendant-Appellant.

UNPUBLISHED

March 2, 2001

No. 218071

Oakland Circuit Court

LC No. 98-163326-FC

Before: Markey, P.J., and McDonald and K. F. Kelly, JJ.

PER CURIAM.

Defendant was convicted by a jury of assault with intent to commit murder, MCL 750.83; MSA 28.278, and sentenced as a third habitual offender, MCL 769.11; MSA 28.1083, to twenty-five to fifty years' imprisonment. He appeals as of right. We affirm.

Defendant first argues that he was denied a fair trial by the repeated introduction by the prosecutor of highly inflammatory and unsubstantiated information that he was a gang member and made "gang signs" towards the victim and his friends. We disagree.

The trial court properly sustained defendant's objections to the introduction of this evidence as lacking a foundational basis. See MRE 602 and 701. As defendant correctly asserts, a prosecutor may not deliberately inject racial or ethnic remarks into any trial, or appeal to the fears and prejudices of the jury. *People v Cooper*, 236 Mich App 643, 651; 601 NW2d 409 (1999). Although the first reference to gang gestures appears to have been inadvertent, the prosecutor should not have continued to question subsequent witnesses along the same line to elicit additional "inadvertent" references to defendant's supposed gang involvement. The introduction of this extraneous, prejudicial material was improper. *People v Rice (On Remand)*, 235 Mich App 429, 438; 597 NW2d 843 (1999).

However, the introduction of this information does not warrant reversal under the circumstances of this case. Even if preserved, a nonconstitutional error is not a ground for reversal unless, after an examination of the entire case, it affirmatively appears that it is more probable than not that the error was outcome determinative. *People v Brownridge (On Remand)*, 237 Mich App 210, 216; 602 NW2d 584 (1999). The defendant bears the burden of demonstrating that such an error resulted in a miscarriage of justice. *Id.* There were several witnesses in the instant case that refuted defendant's claim of self defense. According to several

witnesses, defendant escalated the initial confrontation after the victim's friends tried to apologize for mistaking defendant for another individual. Defendant produced a knife and antagonized the group by scraping it against their car. The witnesses also testified that defendant, the only person with a weapon, stabbed the victim out of malice, not from any justifiable fear for his own safety. Viewed as a whole, the record does not indicate that it is more probable than not that the references to "gang signs" affected the outcome of the case.

Defendant also argues that he was unfairly prejudiced by the disclosure of information that he has a criminal record and was on parole at the time of the offense. We disagree. The record clearly indicates that the references to this information were volunteered by the witnesses. An unresponsive, volunteered answer to a proper question is not usually grounds for granting a mistrial. See *People v Gonzales*, 193 Mich App 263, 266-267; 483 NW 2d 458 (1992). Additionally, the trial court properly instructed the jurors to disregard the information as having no relevancy to the case. We are satisfied that the court's instruction adequately dispelled any resulting prejudice. *People v Reed*, 449 Mich 375, 401; 535 NW2d 496 (1995). Thus, we find no error requiring reversal as a result of the disclosure of this information.

Defendant next argues that his sentence is disproportionate. We disagree. Defendant was sentenced within the range recommended by the sentencing guidelines. Defendant has failed to identify any unusual circumstances to overcome the presumptive proportionality of his sentence. *People v Milbourn*, 435 Mich 630, 661; 461 NW2d 1 (1990); *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987); *People v Kennebrew*, 220 Mich App 601, 609; 560 NW2d 354 (1996). Accordingly, we conclude that the trial court did not abuse its sentencing discretion.

Affirmed.

/s/ Jane E. Markey
/s/ Gary R. McDonald
/s/ Kirsten Frank Kelly