

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TERRENCE LAVELLE WILLIAMS, a/k/a
TERRANCE LAVELL WILLIAMS,

Defendant-Appellant.

UNPUBLISHED

July 26, 2002

No. 229926

Kent Circuit Court

LC No. 00-003744-FC

Before: Neff, P.J., and White and Owens, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree premeditated murder, MCL 750.316, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced as a second habitual offender, MCL 769.10, to life imprisonment for the murder conviction, and a consecutive two-year term for the felony-firearm conviction. He appeals as of right. We affirm.

Defendant's convictions arise from the fatal shooting of a bouncer at the entrance to a bar near closing time. The prosecution's theory at trial was that defendant, a member of the Wealthy Street Boys gang, returned to the bar to shoot the bouncer, who had earlier maced and evicted another member of defendant's gang from the bar.

I

Defendant argues that the trial court erred in failing to suppress an in-court identification by Christopher Pearl, the first of several witnesses to identify defendant as the shooter. Defendant asserts that Pearl's in-court identification was tainted by an impermissibly suggestive pretrial identification procedure. We disagree.

As he argued below, defendant asserts that a suggestion to Pearl to pick defendant as the shooter arose from the fact that defendant or his picture appeared in various lineups¹ and was the only constant. Specifically, defense counsel argued below that “[i]t doesn’t take a genius to figure out that if you show a person that the one common denominator in all of these lineups is my client, Mr. Williams, that [Pearl] know[s] who the prosecution, or at least it lends itself to the argument that they’re pushing [him] to identify who they want identified. And he’s already indicated he can’t identify anybody.” After a hearing outside the presence of the jury, the trial court admitted Pearl’s in-court identification, finding that there was an “independent basis” and that there was “no taint, no suggestiveness” in the pretrial identification procedure. Pearl subsequently identified defendant as the shooter, stating that he was “a hundred percent sure” of his identification of defendant as the shooter. Defense counsel cross-examined Pearl on credibility issues surrounding the identification.

The decision to admit an in-court identification will not be reversed on appeal unless it is clearly erroneous. *People v Colon*, 233 Mich App 295, 304; 591 NW2d 692 (1998). If a witness is exposed to an impermissibly suggestive pretrial identification procedure, then the witness’ in-court identification will not be allowed unless the prosecution shows by clear and convincing evidence that the in-court identification will be based on a sufficiently independent basis to purge the taint of the illegal identification. *Id.* “The defendant must show that in light of the totality of the circumstances, the procedure used was so impermissibly suggestive as to have led to a substantial likelihood of misidentification.” *Id.* Simply because an identification procedure is suggestive, however, does not mean it is necessarily constitutionally defective. *Id.*

Defendant has not shown that in light of the totality of the circumstances, the procedure used was so impermissibly suggestive as to have led to a substantial likelihood of misidentification. The testimony elicited at trial reveals that Pearl was able to identify defendant in a corporeal lineup from the first time he saw him in a lineup, but simply declined to do so. Pearl attended that lineup only after retaining counsel and being properly subpoenaed. He identified someone other than defendant when asked to identify the shooter in the lineup, but testified that he did so only because he wanted investigators to leave him alone. Pearl ultimately identified defendant as the shooter in a corporeal lineup in April 2000, but informed investigators that he (Pearl) would be difficult to find at the time of trial. Defendant has not shown that Pearl’s eventual identification of defendant as the shooter was the result of defendant’s inclusion in the prior lineups presented to Pearl.

Furthermore, even assuming that defendant has demonstrated that the pretrial identification procedure was impermissibly suggestive, clear and convincing evidence existed independent of the pretrial identification to support the admissibility of the in-court identification of defendant. The independent basis inquiry is a factual one, and the validity of the in-court

¹ Defendant does not contest that the other photographs displayed individuals who fairly represented his physical features. See *People v Kurylczuk*, 443 Mich 289, 304; 505 NW2d 528 (1993), quoting Sobel, *Eyewitness Identification*, § 5.3(a), pp 5-9 to 5-10. (“Generally, the photo spread is not suggestive as long as it contains some photographs that are fairly representative of the defendant’s physical features and thus sufficient to reasonably test the identification.”).

identification is viewed in light of the totality of the circumstances. *People v Thomas Davis*, 241 Mich App 697, 702; 617 NW2d 381 (2000). A court must look at a variety of factors to determine the likelihood of misidentification, such as the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation. *People v Kurylczuk*, 443 Mich 289, 306 (Griffin, J.), 318 (Boyle, J.); 505 NW2d 528 (1993), quoting *Neil v Biggers*, 409 US 188, 199-200; 93 S Ct 375; 34 L Ed 2d 401 (1972).

Analyzing the relevant factors in this case, we hold that the trial court did not clearly err in finding that a clear and convincing independent basis supported Pearl's in-court identification of defendant. Pearl had ample opportunity to view the shooter. Pearl testified that he was approximately four to five feet away from the shooter when the shooting occurred. Although Pearl initially refused to identify defendant and identified someone other than defendant in a lineup, he explained that he did so because of his desire not to get involved. "Where there are other indicia of reliability, an initial inability to identify the defendant or a tentative false identification of another person will not invalidate a witness' identification of the defendant." *Kurylczuk, supra* at 309. Last, Pearl was confident of his identification, testifying at trial that he was "a hundred percent sure" of his identification of defendant as the shooter. Pearl's initial reluctance to identify defendant pertains to the weight and credibility, not the admissibility, of his identification testimony. See *Kurylczuk, supra*; *People v James Davis*, 106 Mich App 351, 352; 308 NW2d 206 (1981).

The prosecution showed, by clear and convincing evidence, that the witness' identification of defendant had a sufficiently independent basis and was not based on any suggestiveness surrounding the pretrial identification procedure. Therefore, the trial court did not clearly err in allowing Pearl to identify defendant at trial.

II

Defendant argues that the trial court abused its discretion in admitting evidence of gang profiling from two expert witnesses, Police Lieutenant Whitney Wu and Police Deputy Mark Neuman. Defendant asserts that the evidence was improperly admitted as substantive evidence of his guilt because it demonstrated a motive, to wit: that, in shooting the deceased, defendant reacted as a gang member would be expected to react. Defendant points out that the trial court did not instruct the jury concerning the use of the expert witness' testimony and asserts that the remaining evidence of his potential guilt was also consistently gang-related. Last, defendant argues that his membership in a gang was bad acts evidence, inadmissible under MRE 404(b).

A

The prosecution filed a notice of intent to introduce evidence of defendant's gang membership and expert testimony to explain why defendant, who had no apparent grudge against the deceased bouncer, would be motivated to shoot the deceased.² Following a hearing, the trial

² The prosecution also sought admission of evidence of similar shootings in which defendant had previously been involved, but the trial court excluded the evidence as too prejudicial.

court held that it would not preclude the prosecution from calling witnesses in support of the “gang theory.”.

At trial, the witnesses were qualified as experts and permitted to testify about gang membership in Grand Rapids. In pertinent part, Wu testified that the Wealthy Street Boys were a dominant gang in Grand Rapids and were associated with the Vice Lords in Chicago. Wu testified that defendant and other witnesses at trial were suspected members of the Wealthy Street Boys. Wu quoted from the Vice Lords’ Constitution, from the Code of Conduct section on “respect,” and the section entitled “Principles of Laws,” which contained the following statement: “I, as a representative of the AVLN, Almighty Vice Lord Nation, swear that I will never deny any Vice Lord, materially, spiritually, mentally, financially, or physically, my help under any circumstances at all or be denied.”

The prosecution presented Wu with the following hypothetical based on the facts of this case for the stated purpose of discerning defendant’s motive.

Q. I want to put forth a factual scenario to you. It is for the purpose of discerning motive, if any. We have Jermaine and Robert Threats kicked out of a bar. Robert Threats is maced in that process. Later they return to the same bar, later the same night.

Robert was maced, now he returns with a spray bottle of his own, a Windex-type bottle. He goes there with the intent, apparently, of spraying the person or persons who sprayed him, but it goes awry. He’s going to spray a bouncer, but the bouncer’s too much for him, takes the bottle away, breaks it open and actually sprays—throws the contents of the bottle back on Robert.

Would this be viewed as a loss of face?

A. Most definitely, it would.

Q. Let us further assume that all of this latter action takes place in the presence of rival gang members, Tommy Ezell and Anthony McIntosh, people you have identified as being Lafayette Street Boys. How does that factor into the equation?

A. It makes the embarrassment all the more worse.

Q. Would it be consistent within the culture of that gang for a third party, not directly involved in the actions I’ve told you about, to step in and do something to save the face of the gang?

MR. PEBLEY [defense counsel]: Your Honor, I guess I would object. We’re getting kind of close to the ultimate conclusion here, which there is no indication of. I think he’s asking for something that’s ultimately going to be a jury function.

THE COURT: Mr. Schieber?

MR. SCHIEBER [the prosecutor]: I'm asking whether this is a recognizable motive within that culture. Motive is not something that the jury will make a decision on.

THE COURT: I'll allow it for that purpose. Go ahead.

BY MR. SCHIEBER:

Q. Do you understand my question?

A. Yes, I do. If the individual was a member of the person's same gang, he would have an obligation to step in and defend, save face, for not only the member who is getting that little Windex bottle taken away from him, but the gang as a whole.

Q. And, in fact, if this individual did it, it would have the effect of having him viewed how within his own gang?

A. It would, again, increase the status, that violent act that makes him that much more powerful, that much more of a key figure.

Last, Wu noted that a federal task force specifically investigating the Wealthy Street Boys resulted in "quite a few indictments."

Neuman corroborated Wu's testimony, also testifying that defendant was a "self-admitted" member of the Wealthy Street Boys. Defendant told Neuman during the booking process that he was a member of the Wealthy Street Boys because he did not want to be placed in jail near any Lafayette Street Boys.

The trial court did not caution the jury against using the expert witnesses' testimony as substantive evidence of defendant's guilt. However, defendant did not request such a limiting instruction and expressed his satisfaction with the jury instructions.

B

Defendant has preserved for our review his argument that evidence of his membership in a gang was inadmissible evidence under MRE 404(b), because this argument was made before and considered by the trial court. MRE 103(a)(1).

MRE 404(b) provides the following:

(1) Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

To be admissible under MRE 404(b), bad acts evidence generally must satisfy three requirements: (1) it must be offered for a proper purpose, (2) it must be relevant, and (3) its probative value must not be substantially outweighed by its potential for unfair prejudice. A proper purpose is one other than establishing the defendant's character to show his propensity to commit the offense. *People v Starr*, 457 Mich 490, 495-496; 577 NW2d 673 (1998); *People v VanderVliet*, 444 Mich 52, 74; 508 NW2d 114 (1993), modified 445 Mich 1205 (1994). The prosecutor bears the burden of establishing relevance. *People v Crawford*, 458 Mich 376, 385; 582 NW2d 785 (1998).

The admissibility of bad acts evidence is within the trial court's discretion and will be reversed on appeal only when there has been a clear abuse of discretion. *Id.* at 383. An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling. *People v Snider*, 239 Mich App 393, 419; 608 NW2d 502 (2000).

As a general rule, proof of motive, while not essential, is relevant in a prosecution for first-degree murder. *People v Wells*, 102 Mich App 122, 128; 302 NW2d 196 (1980). "This is particularly true where the accused does not deny participation to some extent or being present at the scene of the crime but claims lack of intent" *Id.* at 128-129. "Evidence of motive is also material in proving premeditation or deliberation." *Id.* at 129. However, even where motive is relevant, the prosecution is not permitted to admit "essentially any evidence remotely connected with the accused or his social acquaintances" to show motive; rather, there must be some connection between the alleged gang affiliation and the defendant's conduct. *Id.*

Here, the prosecutor sought to prove that the motive for the shooting stemmed directly from defendant's gang membership and the accompanying gang-related behavior of defending another gang member. The evidence of gang membership provided the factual context for understanding an otherwise inexplicable act and thereby helped establish motive. Specifically, the experts' testimony supported the prosecution's theory that defendant, a member of the Wealthy Street Boys gang, was motivated to shoot the deceased in order to avenge a perceived insult suffered by a fellow gang member and thereby increase defendant's status within the gang. Therefore, the evidence was not irrelevant.

Further, we cannot say that the probative value of this evidence was substantially outweighed by the danger of unfair prejudice. MRE 403. Likewise, because the evidence was offered for a proper purpose other than to show defendant's propensity to commit such an offense, the admission of the evidence did not violate MRE 404(b). *VanderVliet, supra*.

Because we cannot say that an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the trial court's ruling, we hold that the trial court did not abuse its discretion in admitting the evidence of defendant's membership in a gang.

C

To the extent that defendant also argues that the expert testimony constituted impermissible profile evidence, this argument is not preserved for our review because the trial court was never called upon to address this argument. To preserve an evidentiary issue for

review, a party opposing the admission of evidence must object at trial and specify the same ground for objection that it asserts on appeal. MRE 103(a)(1); *People v Griffin*, 235 Mich App 27, 44; 597 NW2d 176 (1999). Therefore, we review this argument only to determine whether a plain error occurred that affected defendant's substantial rights, i.e., an error that affected the outcome of the lower court proceedings. See *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Similarly, to the extent that defendant challenges the trial court's failure to provide the jury with a limiting instruction on the proper use of the alleged profile evidence, defendant's failure to object to the jury instructions precludes appellate relief absent a plain error affecting defendant's substantial rights. MCL 768.29; *Carines*, *supra* at 763-765.

Defendant cites *People v Hubbard*, 209 Mich App 234; 530 NW2d 130 (1995), as precedent for finding that gang profile evidence was impermissibly admitted as substantive evidence of his guilt. In *Hubbard*, *id.* at 237-238, the trial court allowed a police detective to testify over a defense objection about the common characteristics of drug dealers, and the prosecution referred to this profile evidence as circumstantial evidence of the defendant's guilt in presenting its theory of the case to the jury.

A profile is "a listing of characteristics that in the opinion of law enforcement officers are typical of a person engaged in a specific illegal activity." *Id.* at 239, quoting *United States v McDonald*, 933 F2d 1519, 1521 (CA 10, 1991). The evidence is inherently prejudicial to the defendant because the profile may suggest that innocuous events indicate criminal activity. *People v Murray*, 234 Mich App 46, 53; 593 NW2d 690 (1999).

In this case, to the extent the expert witnesses testified about gang membership and the code of conduct accompanying gang membership, the testimony is not impermissible profile evidence indicative of criminal activity, and was properly admitted expert testimony. MRE 702, which governs expert testimony, permits a court to admit expert testimony where the trial court determines that specialized knowledge will assist the trier of fact in understanding the evidence. We are satisfied that the expert testimony addressing gang membership and the code of conduct adhered to by gang members does not fall within the purview of the average juror. The trial court did not abuse its discretion in concluding that specialized knowledge in this area would assist the jury in evaluating the evidence.

However, there is often a very fine line between the probative use of profile evidence as background evidence and its prejudicial use as substantive evidence, especially where the testimony is offered by police officers. *Murray*, *supra* at 54-55. "[D]ifficult as it may sometimes be, courts must take into consideration the particular circumstances of a case and enable profile testimony that aids the jury in intelligently understanding the evidentiary backdrop of the case, ... but stop short of enabling profile testimony that purports to comment directly or substantively on a defendant's guilt." *Id.* at 56. Hence, the expert witness should not "expressly compare the defendant's characteristics to the profile in such a way that guilt is necessarily implied." *Id.* at 57.

To the extent the prosecution elicited impermissible profile testimony from the expert witnesses in posing hypotheticals based on the shooting in this case, the limited profile testimony was harmless and not decisive of the outcome of the case. There was substantial direct evidence

of defendant's guilt independent of the profile evidence, including positive identifications by several witnesses at the scene of the shooting. Therefore, we find no error requiring reversal. See *Carines*, *supra* at 763-764.

III

Defendant argues that the prosecutor committed misconduct in (1) asserting during closing argument that "he only charged the right person, the defendant, after many months of investigation," (2) arguing that Mario Curry was telling the truth during his interview with police rather than at trial because he consulted his mother, an ordained minister, before the police interview, and (3) opining during closing argument that "the police did a very good job in the lengthy investigation."³ We disagree.

Because defendant did not object to the challenged conduct at trial, appellate relief is foreclosed absent plain error affecting defendant's substantial rights. *Carines*, *supra* at 763-764. Viewing the challenged remarks in context, *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999), we find no plain error.

First, contrary to defendant's representation, the prosecutor did not address the prosecution's decision-making process in charging defendant; rather, the prosecutor addressed during rebuttal argument the reasons for not charging another gang member with murder (Tr X, 106-107). The prosecutor's remarks were made in response to defense counsel's closing argument that the other gang member, not defendant, was responsible for the shooting in this case. Hence, the statements did not constitute misconduct requiring reversal. See *People v Duncan*, 402 Mich 1, 16-17; 260 NW2d 58 (1977); *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000).

Second, the prosecutor did not commit misconduct by commenting upon testimony from a police officer about the reason for the witness' failure to testify at trial consistent with his statement to the police. A prosecutor may argue from the facts that a witness' trial testimony is not worthy of belief. See *People v Launsbury*, 217 Mich App 358, 361; 551 NW2d 460 (1996).

Last, contrary to defendant's representation, the prosecutor did not generally opine that the police did a very good job in the lengthy investigation; rather, the prosecutor stated that the police "did a very good job in finding quite a large number of people" present at the scene of the shooting, but had little success in finding persons willing to testify against defendant. The prosecutor's isolated statement was a comment upon the evidence admitted at trial. The statement did not violate the well-known rule that the prosecutor may not ask the jury to convict the defendant on the basis of the prosecutor's personal knowledge and the prestige of his office rather than on the evidence. See *People v Ignofo*, 315 Mich 626, 631-636; 24 NW2d 514 (1946).

³ Defendant also asserts that the prosecutor improperly "testified sub silentio" by revealing during examination of witnesses that he had been present during the interviews, but defendant did not provide this Court with any references to the trial transcript. A party may not merely state a position and then leave it to this Court to discover and rationalize the basis for the claim. *Griffin*, *supra* at 45.

To the extent any of the remarks highlighted by defendant could be considered improper, a curative instruction would have eliminated any resulting prejudice. Therefore, defendant's substantial rights were not affected by the claims of prosecutorial misconduct he advances. See *Carines, supra*; *Schutte, supra* at 720-721.

IV

Defendant argues that the cumulative effect of the improper admission of various pieces of unobjected-to evidence of his alleged gang membership denied him a fair trial. Defendant points to the admission of a photograph of a witness making a gang sign; testimony by a court deputy that defendant smiled at the deceased's mother when she began to cry during trial; testimony by a court deputy that prosecution witness Curry and defendant made eye contact and conversed, i.e., "did a little dance" and smiled at each other after Curry's testimony; testimony by the expert witness that defendant stated during booking that he did not want to be placed by other gang members; and testimony by the expert witness that several members of the Wealthy Street Boys gang had been convicted in federal court. Defendant asserts that the trial court abused its discretion in admitting this evidence where the prosecution used the evidence to show that defendant, an alleged gang member, responded as a gang member would respond to events during trial proceedings.⁴ Defendant asserts that his trial counsel was ineffective in failing to object to each of these instances.⁵ We disagree.

In a case where the cumulative effect of a number of minor errors may provide the basis for reversal, this Court must determine whether reversal is required not because there are some irregularities but because the defendant has not had a fair trial. *People v Kvam*, 160 Mich App 189, 201; 408 NW2d 71 (1987). We have reviewed the instances cited by defendant and find that the evidence was not improperly admitted.

First, regarding the admission of the photograph and the contact between defendant and the prosecution witness, we again reiterate that the prosecutor sought to prove that the motive for the shooting stemmed directly from defendant's gang membership and the accompanying gang-related behavior of defending another gang member. In contrast, defendant and several of the prosecution's witnesses repeatedly denied any gang participation. Indeed, defendant denied that the gang existed at all.⁶ The evidence of the photograph and the contact between defendant and

⁴ To the extent that defendant also attempts to analyze the admission of this evidence under MRE 404(b), we reject this analysis. Evidence is not subject to MRE 404(b) analysis merely because it discloses a bad act; bad acts can be relevant as substantive evidence, admissible under MRE 401, without regard to MRE 404. *VanderVliet, supra* at 64.

⁵ Defendant failed to create a testimonial record in the trial court with regard to his claims of ineffective assistance. "This failure forecloses appellate review unless the record contains sufficient detail to support defendant's claims." *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Dixon*, 217 Mich App 400, 408; 552 NW2d 663 (1996).

⁶ For example, defendant testified "[t]here's no such thing as Wealthy Boys," only "people who hang on Wealthy Street."

the witness was relevant to establishing defendant's motive, see *Wells, supra*, and the probative value of this evidence was not substantially outweighed by the danger of unfair prejudice.

The testimony that defendant smiled at the deceased's mother when she began to cry during trial was properly admitted evidence of defendant's demeanor during trial. Cf. *People v Krueger*, 466 Mich 50, 55; 643 NW2d 223 (2002) (holding that the defendant was "deprived of the ability to make the subtle statement by his presence and demeanor in court that he was innocent of the charges made by his daughter").

Last, to the extent that defendant reiterates his challenge to the testimony by the expert witnesses, we refer to our prior analysis and holding regarding this issue.

We hold that neither the individual nor cumulative effect of the admission of this evidence served to deny defendant a fair trial. We concomitantly find that defendant's right to the effective assistance of counsel was not thereby abridged, as defendant has not shown that but for counsel's failure to object, there is a reasonable probability that the outcome of the trial would have been different. See *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994); *People v Pickens*, 446 Mich 298, 302-303, 332-333; 521 NW2d 797 (1994).

V

In a supplemental brief filed *in propria persona*, defendant argues that he was denied his right to counsel because defense counsel was not present during a "secret meeting" between the prosecutor and Derrek Harrell, one of several witnesses who identified defendant in court as the shooter, and Harrell's attorney. Further, defendant argues that his counsel rendered him ineffective assistance in failing to object to Harrell's subsequent in-court identification of defendant as the shooter and failing to move for a "suppression hearing."

Defendant has not cited any reference to the record indicating that such a meeting with the prosecution transpired, and we have not found one. Even assuming that such a meeting took place, a witness interview does not constitute a critical stage of proceedings for purposes of the Sixth Amendment right to counsel. *People v Sawyer*, 222 Mich App 1, 4; 564 NW2d 62 (1997).

Accordingly, counsel did not render ineffective assistance in failing to make a meritless objection to the identification on this basis. See *People v Torres*, 222 Mich App 411, 425; 564 NW2d 149 (1997). Further, in light of the fact that Harrell was one of several persons identifying defendant, any error in the admission of his testimony did not result in a reasonable probability that, absent an objection by counsel, the outcome of defendant's trial would have been different. See *Pickens, supra*.

Affirmed.

/s/ Janet T. Neff
/s/ Helene N. White
/s/ Donald S. Owens