

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,  
Plaintiff-Appellee,

UNPUBLISHED  
November 17, 2016

v

JAMAL DEVONTA BENNETT,  
Defendant-Appellant.

No. 328759  
Kent Circuit Court  
LC No. 15-000869-FC

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Before: SAWYER, P.J., and MARKEY and O'BRIEN, JJ.

PER CURIAM.

Defendant, Jamal Devonta Bennett, was convicted by a jury of second-degree murder, MCL 750.317, and possession of a firearm during the commission of a felony, MCL 750.227b, and sentenced to consecutive prison terms of 30 to 100 years for the murder conviction and two years for the felony firearm conviction. We affirm.

On appeal, defendant argues that he is entitled to a new trial because the trial court erroneously admitted irrelevant and unfairly prejudicial evidence against him. Specifically, defendant argues that the trial court abused its discretion in admitting two music videos that he participated in and in admitting testimony regarding his and others' gang affiliations. While we agree that the music videos and testimony regarding gang affiliations were erroneously admitted, we disagree that a new trial is warranted under the facts and circumstances of this case.

A trial court's decision to admit or exclude evidence is discretionary and should only be reserved where there is an abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). A trial court abuses its discretion when its decision falls beyond the range of principled outcomes. *People v Feezel*, 486 Mich 184, 192; 783 NW2d 67 (2010). Relatedly, where decisions regarding the admissibility of evidence involve questions of law, appellate review is de novo. *People v Layher*, 464 Mich 756, 761; 631 NW2d 281 (2001). Ultimately, evidentiary errors merit reversal only where, after an examination of the entire record, it appears more probable than not that the error was outcome determinative. *People v Burns*, 494 Mich 104, 110; 832 NW2d 738 (2013).

The admissibility of the music videos at issue in this case is controlled, in pertinent part, by MRE 801(d)(2), which governs the admissibility of statements made by a party opponent. See *People v Goddard*, 429 Mich 505, 519-521; 418 NW2d 881 (1988). To be admissible pursuant to MRE 801(d)(2), evidence must be relevant pursuant to MRE 401 and must not be

unfairly prejudicial pursuant to MRE 403. *Id.* at 515. Relevant evidence, meaning “evidence having a 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,” is generally admissible. MRE 401; MRE 402. However, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. MRE 403. All relevant evidence is prejudicial to some degree; it is only evidence that is unfairly prejudicial that may be excluded pursuant to MRE 403. To determine whether evidence is unfairly prejudicial, courts look to a variety of factors, including, for example, how directly probative it is and whether there is an alternative way to prove the fact at issue. *People v Blackston*, 481 Mich 451, 462; 751 NW2d 408 (2008).

In this case, we agree with defendant’s argument that the two music videos were unfairly prejudicial under the facts and circumstances of this case. The prosecution offered the music videos, both of which involved lyrics regarding violence and gun possession, as evidence of defendant’s intent to kill, i.e., his “mentality of shoot first, ask questions later.” However, one of the music videos was created approximately two months before the shooting at issue in this case, and the second was created approximately one year after. General lyrics about violence and gun possession, especially when made months apart from the crime at issue, are usually viewed as an exercise of machismo rather than a manifestation of an intent to kill. See, e.g., *Goddard*, 429 Mich at 520. Here, defendant shot and killed the victim during a physical altercation at a birthday party, and we fail to see how vague lyrics involving violence and gun possession are sufficiently probative to survive MRE 403. See also *People v Foster*, unpublished opinion per curiam of the Court of Appeals, issued May 19, 2015 (Docket No. 320136), pp 5-8.

Nevertheless, an evidentiary error, including the erroneous admission of unfairly prejudicial evidence, does not warrant reversal unless it appears more probable than not that the error was outcome determinative. *Burns*, 494 Mich at 110. Here, three witnesses testified that they saw defendant shoot the victim. A fourth witness testified that defendant had a firearm, pointed the firearm at the victim, and stated that he would shoot the victim. Several other witnesses observed an individual in a red sweatshirt or jacket shoot the victim and flee, and evidence demonstrated that defendant was wearing a red sweatshirt on the night of the shooting. Defendant claims that these music videos were the only evidence refuting his defense-of-others theory at trial, but, given the lack of relevance discussed above, we fail to see how the music videos could be probative of his intent to defend or his intent to kill. Thus, while we do agree that the music videos were unfairly prejudicial, we are unable to conclude that their erroneous admission was outcome determinative in light of the substantial amount of otherwise damning evidence against defendant. Accordingly, a new trial is not required.

The admissibility of the testimony regarding defendant’s and others’ gang affiliations is controlled, in pertinent part, by MRE 404(b), which governs the admissibility of character evidence. Pursuant to MRE 404(b), character evidence is generally inadmissible unless an enumerated exception applies. When a defendant’s conduct at issue is not gang related, testimony regarding defendant’s or others’ gang affiliations is generally inadmissible in hopes of preventing jurors from assuming that the defendant is a person of bad character or prone to violent behavior. *People v Bynum*, 496 Mich 610, 625-626; 852 NW2d 570 (2014). However, testimony regarding an individual’s gang affiliation is relevant when it explains a witness’s bias

or reflects on a witness's credibility. See *United States v Abel*, 469 US 45, 52; 105 S Ct 465; 83 L Ed 2d 450 (1984).

In this case, the prosecution elicited several witnesses' testimony regarding defendant's and others' gang affiliations. The shooting at issue, however, does not appear to have arisen out of gang loyalty or territory; rather, it appears to have arisen from a dispute between party guests involving firearms. Thus, it was not relevant to the elements of the charged offenses. However, that, in and of itself, does not render it inadmissible. That is, if the testimony were otherwise relevant as it relates to witness bias or credibility, the fact that it did not relate directly to the elements of the charged offenses is not dispositive. *Abel*, 469 US at 52. Here, the testimony presented an explanation as to why multiple witnesses were reluctant or refused to identify defendant as the shooter. In light of its tendency to reflect on multiple witnesses' credibility, it seems that the testimony regarding defendant's and others' gang affiliations was relevant.

Whether it was unfairly prejudicial, however, presents a closer issue. Testimony regarding an individual's gang affiliation is inherently prejudicial, *Bynum*, 496 Mich at 626, and the record reflects a substantial amount of evidence demonstrating the witnesses' bias in favor of defendant aside from their gang affiliation. For example, the prosecution elicited extensive testimony regarding the witnesses' familial relationships or friendships with defendant and other witnesses. Similarly, the prosecution also elicited testimony regarding the fact that several witnesses were charged with perjury as a result of their investigative subpoenas, were obstructive during the investigation in this matter, and had changed their stories several times. In light of this evidence, we feel compelled to agree with defendant's argument that the testimony regarding defendant's and others' gang affiliations was needlessly cumulative and unfairly prejudicial.

Nevertheless, as with the music videos, defendant remains unable to demonstrate that any error in this regard was outcome determinative. *Burns*, 494 Mich at 110. Again, numerous witnesses either saw defendant shoot the victim or saw an individual dressed the same as defendant shoot the victim. Defendant's theory at trial was premised on his claim that he was acting in the defense of others, and the jury was free to believe or disbelieve his, as well as the prosecution's, theory. Thus, while it does appear that the testimony regarding defendant's and others' gang affiliations was unfairly prejudicial, we are unable to conclude that their erroneous admission was outcome determinative in light of the substantial amount of otherwise damning evidence against defendant. Accordingly, a new trial is not required.

In a brief filed pursuant to Administrative Order No. 2004-6, Standard 4, defendant also argues that his right to silence under the Fifth Amendment was violated because the trial court allowed the prosecutor to comment on his silence during trial. We disagree. Prosecutorial-misconduct claims are reviewed de novo to determine whether the defendant was deprived of his or her right to a fair and impartial trial. *People v Mann*, 288 Mich App 114, 119; 792 NW2d 53 (2010). Similarly, questions of law, including constitutional issues, are also reviewed de novo. *People v Clary*, 494 Mich 260, 264; 833 NW2d 308 (2013). It is undisputed that the Fifth Amendment unequivocally prohibits the use of a defendant's decision not to testify as substantive evidence of his or her guilt. *Id.* at 265. "However, [p]rosecutors are typically afforded great latitude regarding their arguments and conduct at trial. They are generally free to argue the evidence and all reasonable inferences from the evidence as it relates to their theory of

the case.” *Mann*, 288 Mich App at 120 (citation and internal quotation marks omitted; alterations in original).

Here, defendant argues that his right to silence was violated when the prosecutor argued that defendant had not provided a “shred of evidence to show what [he] subjectively believed,” i.e., to show that he was acting in the defense of others, as well as when the prosecutor argued that “[t]he first time there was any concession [regarding firearm possession] was during jury selection by defense counsel.” We disagree. The prosecutor’s arguments in this regard with within the discretion afforded to prosecutors during argument. *Mann*, 288 Mich App at 120. Defendant likens the facts of this case to those in *Griffin v California*, 380 US 609; 85 S Ct 1229; 14 L Ed 2d 106 (1965), but *Griffin* is distinguishable. In that case, the jury was instructed that it “may take [the defendant’s failure to testify] into consideration as tending to indicate the truth and as indicating that among the inferences that may be reasonably drawn therefrom those unfavorable to the defendant are the more probable.” *Id.* at 610. Here, on the other hand, the trial court did not give such an instruction, nor did the prosecutor make any comparable remarks. Rather, the prosecutor argued that defendant was not acting in defense of others, and the trial court properly instructed the jury, in response to defense counsel’s objection, that “every defendant has an absolute right not to testify.” Indeed, because the trial court gave this immediate instruction, any error in this regard was presumptively cured, and defendant makes no attempt to overcome that presumption. *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003). Accordingly, a new trial is not required.

Affirmed.

/s/ David H. Sawyer  
/s/ Jane E. Markey  
/s/ Colleen A. O’Brien