

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
February 16, 2012

v

PABLO CUELLO TORRES,
Defendant-Appellant.

No. 298940
Kent Circuit Court
LC No. 09-013150-FC

Before: SAWYER, P.J., and O'CONNELL and RONAYNE KRAUSE, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree murder, MCL 750.317, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced as an habitual offender, second offense, MCL 769.10, to life for his second-degree murder conviction and to two years' imprisonment for his felony-firearm conviction. We affirm.

On appeal, defendant argues four pieces of evidence presented during trial were inadmissible. Because defendant failed to preserve these evidentiary challenges, we review for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). We look first at the prosecution's introduction of evidence that defendant belonged to a cipher known as L-Block and conclude this information was relevant to the credibility of many of the witnesses involved. One of the basic rules of evidence is that all logically relevant evidence is admissible, unless otherwise prohibited. MRE 402; *Lewis v LeGrow*, 258 Mich App 175, 199; 670 NW2d 675 (2003). Relevant evidence is that which has any tendency to make a fact of consequence more or less likely. MRE 401. The interests and biases of witnesses are always relevant. *People v Layher*, 464 Mich 756, 764; 631 NW2d 281 (2001). Particularly in this case, in large part because of the existence of plea agreements, the credibility of the witnesses was an important issue during trial. Given the defense's repeated arguments that witnesses were coming forward with fabricated information only to make a plea deal, the prosecution was justified in presenting the argument that witnesses did not come forward in 2006 because of their gang allegiance to defendant. While the witnesses may still have obtained a "deal" in exchange for their testimony, their testimony appears more credible when it becomes apparent they were turning in a fellow gang member and friend. This is particularly true with regard to Gary Griggs, one of the prosecution's key witnesses who decided to go back on his plea agreement and disavow any knowledge of the victim's death. The prosecution offered Griggs' grand jury testimony during which Griggs said defendant confessed

to the crime. Accordingly, the prosecution sought to establish Griggs was lying during trial when he said defendant never confessed to the killing. The prosecution is free to challenge the credibility of its own witness. MRE 607. Here, the prosecution challenged Griggs' denial of any knowledge of the victim's death by introducing he and defendant were fellow gang members, a fact which bore on Griggs' bias. See, e.g., *Layher*, 464 Mich at 764.

Turning next to evidence of gang intimidation in defendant's neighborhood, we similarly conclude this evidence was relevant to credibility of witnesses. Defendant specifically argues that the prosecution presented evidence that the victim was afraid to name his shooter before he died. We note that although the prosecution presented evidence the victim did not name his shooter, no testimony on the subject suggested the victim remained silent from fear. We further conclude evidence that the victim did not name his shooter was relevant. In a murder trial, the identity of the killer is certainly at issue, and given the number of people who interacted with the victim following the shooting, whether he named his shooter was a relevant inquiry explored by both the prosecution and the defense during trial. *People v Mills*, 450 Mich 61, 70; 537 NW2d 909 (1995) (noting that a not guilty plea places all elements of a criminal offense at issue). To the extent the prosecution argued the victim's silence demonstrated a fear of reprisal, this was an argument, not evidence, and any improper statement by the prosecution could have been cured with a cautionary instruction. *People v Ackerman*, 257 Mich App 434, 449; 669 NW2d 818 (2003).

Next, although defendant speaks in general terms of the other evidence of gang reprisal, we note four instances that we will discuss here briefly. First, two police officers testified in general terms to the lack of cooperation they generally received relating to the investigation of crimes in defendant's neighborhood. We conclude this testimony, offered in conjunction with details of the investigation into the victim's death, was relevant to explain why a murder that took place in 2006 went unsolved for several years. The prosecution never suggested defendant was responsible for terrorizing the neighborhood; the prosecution merely presented evidence to explain the delay in the police investigation, and the lack of cooperation from witnesses. Second, Griggs spoke of the treatment of "snitches" by gangs, and offered his opinion that they should "have their head blew off." As noted above, during trial, Griggs attempted to disclaim any knowledge of the victim's death or defendant's involvement. It was therefore highly relevant to establishing his bias that in his opinion "snitching" was dishonorable. Third, Kourtney Jones testified that she was afraid to testify because "I don't know. People get killed. Who knows." The prosecution inquired into Kourtney's fear after her repeated claims that she did not recall or that she did not know the answer to the prosecutor's questions. Importantly, the prosecution never suggested defendant in particular threatened Kourtney. In light of her claims not to remember what she had testified to at the preliminary examination, it was relevant to her credibility that she testified in fear. Finally, Allen Battles testified to receiving threatening notes following his agreement to cooperate with authorities and offer testimony against defendant. We note first of all that during cross-examination defense counsel made it clear defendant could not be linked to the threats Battles received. We conclude the information was relevant to bolstering Battles' credibility in light of repeated suggestions that he agreed to testify for his own benefit.

Having concluded evidence of defendant's gang involvement, and evidence of gang intimidation were relevant, we also conclude that the evidence did not unfairly prejudice defendant. Relevant evidence may be excluded if its probative value is substantially outweighed

by the danger of unfair prejudice. MRE 403; *Mills*, 450 Mich at 75. We find that is not the case here. Contrary to defendant's assertion on appeal, the evidence was never presented as an argument that the jury should convict on a theory of guilt by association, or because his gang involvement showed a propensity to commit crime. As discussed above, the prosecution's use of gang evidence was used to explain why people were uncooperative with police, why there was such a delay from the time the victim was killed until the case came to trial, and to establish the credibility of witnesses. We also note, defendant declined the trial court's offer to consider a limiting instruction relating to the threats received by Battles, and that defense counsel made extensive use of the evidence of gang activity during trial in an attempt to discredit the prosecution's witnesses. Having used much of this evidence himself, it is incongruous to now suggest he was prejudiced by evidence of gang activity in his neighborhood. In light of the facts of this case and the importance of witness credibility, the probative value of the evidence was not substantially outweighed by the potential for prejudice to defendant, and the admission of the evidence was not error. MRE 403.

We look next at evidence presented which suggested defendant previously committed an armed robbery. We agree with defendant that this evidence of other acts was not admissible under MRE 404(b) because the prosecution did not offer a proper purpose, and did not provide adequate pretrial notice or good cause to excuse such notice. MRE 404(b). However, "an isolated or inadvertent reference to a defendant's prior criminal activities will not result in reversible prejudice." *People v Wallen*, 47 Mich App 612, 613; 209 NW2d 608 (1973). Only where "there are deliberate and repeated efforts" by the prosecution to put defendant's past crimes before the jury does the prejudice warrant reversal. *Id.* In this case, reference to defendant's armed robbery was confined to a short sequence of questions posed to Battles, during which the prosecution sought to establish Battles saw defendant receive a revolver like the one described by the eyewitness to the shooting. Although the prosecution sought information about the type of weapon involved, Battles answered with unrequested information about defendant's criminal history. To the extent Battles' answer exceeded the scope of the question, any reference to defendant's criminal activity was inadvertent. Furthermore, while Battles suggested defendant robbed someone, the details and circumstances were never stated, and it was not suggested that defendant was convicted of armed robbery. The prosecution did not reference the robbery again during questioning of other witnesses or during closing. Even though the prosecution asked Battles a follow-up question in which he referenced the armed robbery, in the context of the entire trial, the prosecution did not make repeated and deliberate efforts to press defendant's criminal history upon the jury and reversal is not required. *Wallen*, 47 Mich App at 613.

Defendant's last evidentiary challenge is to the admission of evidence regarding his reputation for violence. Defendant presented no evidence of his own character which the prosecution might have sought to rebut, and defendant presented no evidence to suggest the victim was aggressive which would have allowed the prosecutor to introduce evidence of defendant's reputation for violence. We agree with defendant, therefore, that such evidence was not admissible under MRE 404(a). Although the prosecution overstepped in asking Battles about defendant's reputation for violence, reversal is not required because defendant cannot establish prejudice that affected the outcome of the lower court proceedings. *Carines*, 460 Mich at 763. We begin by noting that although defense counsel failed to object to the evidence, the trial court sua sponte raised the issue and offered a curative instruction, which defense counsel declined for

strategic reasons. A curative instruction could have alleviated the prejudicial effect, and therefore, reversal is not required. *Ackerman*, 257 Mich App at 449. We also note that the evidence of defendant's guilt is overwhelming. Specifically, an eye-witness saw defendant shoot the victim, other witnesses in the area corroborated that there was a shooting and that defendant was present, and defendant later confessed his killing to four individuals who testified at trial. In light of this overwhelming evidence, the reference to defendant's reputation for violence did not prejudice the outcome of the proceedings and reversal is not required. *Carines*, 460 Mich at 763.

Finally, defendant argues that he was denied the effective assistance of counsel because his trial counsel did not object during trial to any of the evidentiary claims he raises on appeal. We disagree. Because defendant failed to move the trial court for a new trial or an evidentiary hearing, his claim is unreserved and review is limited to mistakes apparent on the record. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658; 620 NW2d 19 (2000). A claim alleging the denial of effective assistance of counsel presents a mixed question of law and fact. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Questions of law are reviewed de novo, and a trial court's findings of fact, if any, are reviewed for clear error. *Id.* To establish the ineffective assistance of counsel, defendant must show (1) that "counsel's representation fell below an objective standard of reasonableness," and (2) that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v Washington*, 466 US 668, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984). The effective assistance of counsel is presumed, and "[t]his Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight." *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999).

In this case, with regard to the evidence of defendant's gang involvement and gang intimidation, because the evidence was relevant and not unfairly prejudicial, it was admissible. MRE 402; MRE 403. Because the evidence was properly admitted, defense counsel was not objectively unreasonable for failing to object. Counsel is not required to advocate a meritless position or offer a futile objection. *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010); *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000). Moreover, in this particular case, defense counsel made the strategic decision to attempt to exploit the evidence of gang activity to discredit the prosecution's witnesses. Defendant bears a heavy burden in demonstrating this tactic was not sound trial strategy, *LeBlanc*, 465 Mich at 578, and in this case, where the prosecution's case rested almost entirely on the testimony of gang members and criminals, defense counsel's strategy to discredit them using evidence of gang activity appears to be a sound one. Although the strategy ultimately proved unsuccessful, this does not mean counsel was ineffective. *People v Kevorkian*, 248 Mich App 373, 415; 639 NW2d 291 (2001).

However, with regard to the evidence relating to defendant's previous robbery, and his reputation for violence, the record suggests trial counsel acted unreasonably in not objecting. Neither piece of information was admissible, and an objection by defense counsel would likely have prevailed. Because neither defendant's commission of a robbery nor his reputation for violence were relevant, nor helpful to defendant's case, it would be hard to conceive of a trial strategy that would welcome the introduction of this information. However, to prevail, defendant must also establish a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 US at 694. A

reasonable probability exists where counsel's conduct was so prejudicial as to render the proceedings "fundamentally unfair or unreliable." *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001). Here, both references to defendant's reputation for violence and the previous robbery were inconsequential in the context of all the evidence presented, and did not impact the outcome of the proceedings. As noted above, the evidence of defendant's guilt was overwhelming. An eye-witness saw defendant shoot the victim, and defendant confessed the killing to four people who testified at trial. Defendant cannot establish that absent counsel's error the outcome would have been different, and, accordingly, reversal is not required. *Strickland*, 466 US at 697.

Affirmed.

/s/ David H. Sawyer

/s/ Peter D. O'Connell

/s/ Amy Ronayne Krause