

2012 IL App (1st) 110480-U

FOURTH DIVISION
JUNE 28, 2012

No. 1-11-0480

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 10 CR 1517
)	
HARRY MORRIS,)	Honorable
)	James B. Linn,
Defendant-Appellant.)	Judge Presiding.

JUSTICE PUCINSKI delivered the judgment of the court.
Justices Fitzgerald Smith and Sterba concurred in the judgment.

ORDER

¶ 1 *Held:* Counsel did not render ineffective assistance by not filing a motion *in limine* to limit the extent of gang evidence where gang evidence was relevant, material, and non-cumulative in light of the charge of unlawful possession of a firearm by a street gang member so that an order *in limine* would have been improper. Counsel did not render ineffective assistance by not objecting to the scope or extent of the testimony of a police expert on gangs, where the testimony was highly relevant and any objection would likely have been futile. Defendant's convictions for unlawful possession of a firearm by a street gang member and unlawful use of a weapon by a felon must be vacated under the "one act, one crime" rule as they are based on the same physical act as his conviction for being an armed habitual criminal.

¶ 2 Following a jury trial, defendant Harry Morris was convicted of being an armed habitual criminal, unlawful possession of a firearm by a street gang member, and unlawful use of a weapon by a felon and sentenced to concurrent prison terms of eight, eight, and seven years. On appeal, defendant contends that counsel rendered ineffective assistance by not filing a motion *in limine* to limit the extent of gang evidence and by not objecting more extensively during the testimony of a police expert on gangs. He also contends that his convictions for unlawful possession of a firearm by a gang member and unlawful use of a weapon by a felon must be vacated because they arose from the same physical act as the armed habitual criminal conviction.

¶ 3 Defendant was charged with, and tried for, being an armed habitual criminal, unlawful possession of a firearm by a gang member, and unlawful use of a weapon by a felon. All charges alleged that defendant possessed a firearm on or about December 29, 2009.

¶ 4 At trial, police officers Brian Thomas and Juan Ortega testified that, on the night of December 29, defendant was driving a car with a broken or inactive tail-light. There were three other people in the car. Before the officers could catch up to defendant or signal for him to stop, defendant parked his car and two men (from the front passenger seat and the rear driver's-side seat) went into a nearby home. When Officer Thomas pointed a light into the car, the remaining back-seat passenger opened the passenger-side car door, opened his jacket, and said that "we are clean *** we ain't got nothing." Meanwhile, defendant – still seated in the driver's seat but with the door open – looked towards the officers, then Officer Thomas saw defendant twist his body and bend over towards the pavement. The officers then saw a gun on the pavement next to the driver's door, in the area where Officer Thomas had seen defendant bend over. Officer Thomas arrested defendant while Officer Ortega recovered the gun.

¶ 5 When questioned by Officer Thomas at the police station, defendant claimed that the gun belonged to an Octavio Walker. When asked if he was in a gang, defendant admitted that he was

"a member of the Outlaw street gang, which is a faction of the Black Souls." Defendant had various tattoos on his arms: a "1" and "OUT" on one arm and a "6" and "LAW" on the other (so that the phrase "16 OUTLAW" would be formed by placing his arms together), and the phrases "Black Soul" and "RIP Duck." Defendant explained to Officer Thomas that Duck was a fellow gang member and friend who had been shot to death, and that "16" referred to 16th Street, where the Outlaws gang faction was located.

¶ 6 Officer Gallegos testified that he was assigned to a gang task force, was trained and experienced in gang intelligence and investigation, had testified in over a hundred court cases, and was familiar with the gangs in the area of 16th Street and Homan Avenue in Chicago; in particular, the Black Souls gang. Officer Gallegos explained that the Black Souls is part of the "Folks" alliance of gangs and has about 300-400 members, all male. When asked how the gang marks its territory, Officer Gallegos explained that it historically did so with graffiti but now used tattoos. When asked if the Black Souls has a hierarchy, he explained that the gang leader or "Lion King" has subordinates called "Lieutenants" or "Governors" in charge of particular areas who report back to the Lion King. When asked if the Black Souls has rules, Officer Gallegos explained that it has "a code of conduct and what they are obligated to do under that street gang organization." He gave an example: a member responsible for the loss of narcotics by theft or arrest would "suffer a stiff penalty," beginning for the most junior members with 50 blows to the head taken without shielding oneself.

¶ 7 Officer Gallegos was shown photographs of defendant's arms with the aforementioned tattoos. He explained that "16 Outlaw" identifies the Outlaw or 16th Street faction of the Black Souls, which "is the one[] most directly associated with violent action for the Black Souls," including "retaliatory violent activity against rival gangs" and "enforcement." He also explained that the "Black Souls" tattoo indicates membership in that gang. When defense counsel objected

to Officer Gallegos' explanation of the "RIP Duck" tattoo – indicative that a gang member had suffered violence – on the basis that he was "testifying to the direct meaning of that particular tattoo," the court overruled the objection because a "foundation is laid."

¶ 8 On cross-examination, counsel asked Officer Gallegos if people leave as well as join gangs. He replied that members leaving a gang – and particularly those leaving the Black Souls "and that particular sub-faction" – are expected to remove their tattoos. When counsel pressed on whether every person leaving a gang, and particularly the Outlaws, would have to remove his tattoos, Officer Gallegos testified that they all do so. However, Officer Gallegos admitted that he did not personally examine the estimated two percent of members who voluntarily left the gang.

¶ 9 The parties stipulated that defendant was convicted of two felonies qualifying for the armed habitual criminal charge and of a felony qualifying for the charge of unlawful use of a weapon by a felon. The parties also stipulated that defendant has not been issued a firearm owner's identification card.

¶ 10 A motion for directed verdict, without argument, was denied. Following closing arguments, instructions and deliberation, the jury found defendant guilty of being an armed habitual criminal, unlawful possession of a firearm by a gang member, and unlawful use of a weapon by a felon. Defendant's unsuccessful post-trial motion made no reference to the admission or extent of gang evidence. Defendant was sentenced on the three convictions as stated above, his post-sentencing motion was denied, and this appeal followed.

¶ 11 On appeal, defendant first contends that trial counsel rendered ineffective assistance by not filing a motion *in limine* to limit the extent of gang evidence and by not objecting more extensively during Officer Gallegos' testimony.

¶ 12 A claim that trial counsel failed to render effective assistance is judged by the familiar *Strickland* standard, whereby the defendant must show both that (1) counsel's performance fell

below an objective standard of reasonableness and (2) there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *People v. Manning*, 241 Ill. 2d 319, 326 (2011), citing *Strickland v. Washington*, 466 U.S. 668 (1984).

¶ 13 For purposes of the statute prohibiting the possession of a firearm by a street gang member, 720 ILCS 5/24-1.8 (West 2010), the terms "street gang" and "street gang member" are defined by reference to section 10 of the Illinois Streetgang Terrorism Omnibus Prevention Act (the Act). The Act defines a street gang as "any combination, confederation, alliance, network, conspiracy, understanding, or other similar conjoining, in law or in fact, of three or more persons with an established hierarchy that, through its membership or through the agency of any member engages in a course or pattern of criminal activity." 740 ILCS 147/10 (West 2010). The Act defines a street gang member as "any person who actually and in fact belongs to a gang, and any person who knowingly acts in the capacity of an agent for or accessory to, or is legally accountable for, or voluntarily associates himself with a course or pattern of gang-related criminal activity, whether in a preparatory, executory, or cover-up phase of any activity, or who knowingly performs, aids, or abets any such activity." 740 ILCS 147/10 (West 2010).

¶ 14 The Act defines a "course or pattern of criminal activity" as either "two or more gang-related criminal offenses committed in whole or in part within this State when (1) at least one such offense was committed after the effective date of this Act (2) both offenses were committed within 5 years of each other; and (3) at least one offense involved the solicitation to commit, conspiracy to commit, attempt to commit, or commission of any offense defined as a felony or forcible felony" or as "one or more acts of criminal defacement of property *** if the defacement includes a sign or other symbol intended to identify the streetgang." 740 ILCS 147/10 (West 2010). The Act defines "gang-related" as:

"any criminal activity, enterprise, pursuit, or undertaking directed by, ordered by, authorized by, consented to, agreed to, requested by, acquiesced in, or ratified by any gang leader, officer, or governing or policy-making person or authority, or by any agent, representative, or deputy of any such officer, person, or authority:

- (1) with the intent to increase the gang's size, membership, prestige, dominance, or control in any geographical area; or
- (2) with the intent to provide the gang with any advantage in, or any control or dominance over any criminal market sector, including but not limited to, the manufacture, delivery, or sale of controlled substances or cannabis; arson or arson-for-hire; traffic in stolen property or stolen credit cards; traffic in prostitution, obscenity, or pornography; or that involves robbery, burglary, or theft; or
- (3) with the intent to exact revenge or retribution for the gang or any member of the gang; or
- (4) with the intent to obstruct justice, or intimidate or eliminate any witness against the gang or any member of the gang; or
- (5) with the intent to otherwise directly or indirectly cause any benefit, aggrandizement, gain, profit or other advantage whatsoever to or for the gang, its

reputation, influence, or membership." 740 ILCS
147/10 (West 2010).

¶ 15 Here, first and foremost, the offense of unlawful possession of a firearm by a street gang member does not prohibit possession of firearms by a person who identifies himself as, or is perceived to be, a gang member, but instead "a street gang member" as defined in the Act. 720 ILCS 5/24-1.8(a), (c) (West 2010). Thus, the evidence from Officer Thomas to the effect that defendant admitted to membership in the Outlaws, which in turn is a faction of the Black Souls, establishes that defendant is a member of an organization that defendant and others perceive to be a street gang. The State was still obligated to prove that the Outlaws or Black Souls are in fact a street gang as defined in the Act, and perforce to do so through testimonial evidence in the absence of a stipulation to that effect. Thus, a motion *in limine* to bar Officer Gallegos' gang testimony altogether would have been denied. Contrary to defendant's contention, evidence concerning the Outlaws and Black Souls as organizations in general (in contrast to evidence about defendant in particular) was highly relevant, material, and non-cumulative.

¶ 16 Similarly, we do not see how a reasonable and enforceable order *in limine* limiting in advance the scope of Officer Gallegos' testimony, without depriving the State of a reasonable opportunity to prove the elements of the Act, could have been crafted. Beyond the general rule that evidence that is more prejudicial than probative may be excluded, we are unaware of any law or rule limiting the State to introducing only the minimum quantum of evidence to prove the elements of the charged offenses, nor from corroborating one witness's evidence with another's. Thus, the court could not rule on Officer Gallegos' evidence in the abstract but would have to determine whether a given portion or piece of his testimony was more prejudicial than probative.

¶ 17 We therefore turn to the content of Gallegos' testimony, and to the particular portions thereof argued by defendant to be objectionable. Gallegos' explanation of defendant's tattoos

provides an independent explanation of their meaning, thus precluding an argument that defendant's inculpatory explanation came only from Officer Thomas's testimony. Because the Act defines a street gang and street gang membership functionally – an organization with a hierarchy that engages in a pattern of criminal activity, a person who voluntarily associates himself with gang-related criminal activity – Gallegos' descriptions of the structure and activities of the Black Souls and the Outlaws was highly relevant. In short, his detailed testimony tended to show that the organization of which defendant was a member did not merely claim or appear to be a gang but was in fact a street gang under the Act. Had Officer Gallegos testified as defendant suggests in his reply brief "that the gang had a hierarchy and rules, and that the gang engaged in a pattern of criminal conduct without elaborating on the specifics of the violent nature of the gang," the State would have opened itself to an argument that Officer Gallegos was dealing in mere generalities and opinion without specific underlying facts, thus depriving the jury of the opportunity to make its own determination regarding the Black Souls and/or Outlaws.

¶ 18 Lastly, we note that the one time defense counsel objected during Officer Gallegos' testimony, the court overruled on the basis that a foundation for the testimony had been laid. It is thereby apparent that the court considered expert testimony from Officer Gallegos to be generally proper, so that objections of the sort urged by defendant on appeal would likely have been futile. Similarly, we note that counsel cross-examined Officer Gallegos not regarding the nature or activities of the Black Souls or Outlaws in general but regarding the tattoos; that is, the objective evidence (beyond the admission to Officer Thomas) of defendant's gang membership at the time of the instant offenses. Beyond the fact that defense counsel was making strategic decisions as to where to focus his efforts – did defendant possess the gun? was he a gang member at the time of the alleged offense? – the fact that the defense was apparently not accepting at face value Officer

Thomas's testimony to defendant's admission reinforces the State's decision to prove the significance of defendant's tattoos independently of the admission.

¶ 19 For the aforementioned reasons, we conclude that defendant has failed to show that trial counsel was ineffective for not filing a motion *in limine* to limit the extent of gang evidence or for not objecting more extensively to Officer Gallegos' testimony.

¶ 20 Defendant also contends, and the State agrees, that this court should vacate his convictions for unlawful possession of a firearm by a gang member and unlawful use of a weapon by a felon. The "one act, one crime" rule prohibits convictions for multiple offenses based upon the same physical act. *People v. Tolentino*, 409 Ill. App. 3d 598, 610 (2011). Here, all of defendant's convictions were based on the same physical act of possessing a gun on December 29, 2009.

¶ 21 Accordingly, pursuant to Supreme Court Rule 615(b)(2) (eff. Aug. 27, 1999), defendant's convictions for unlawful possession of a firearm by a street gang member and unlawful use of a weapon by a felon are vacated. The judgment of the circuit court is affirmed in all other respects.

¶ 22 Affirmed in part and vacated in part.