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GUILT BY ASSOCIATION: ADMISSIBILITY OF EVIDENCE OF GANG ACTIVITY AT TRIAL

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INTRODUCTION

Gangs have existed (usually wreaking havoc) in communities across this country since the late 1700's and into the 20th Century with the migration of rural folks to urban areas and the arrival of immigrants seeking to stake their claim in cities and neighborhoods (e.g., New York's Five Points) where the locals were often less than hospitable to foreigners.

During Prohibition, when organized crime flourished, Chicago boasted of over 1,000 gangs and today, according to FBI statistics, there are roughly 33,000 gangs from west coast to east coast including Crips, Bloods, the Mafia, Arian Brotherhood, Skinheads, Hell's Angels, Outlaws, Chosen Few, Afro Dogs, Latin Kings, and more recently, the Proud Boys, Oath Keepers, and certain groups who carry out acts of violence (e.g., rioting and looting) under the banner of Black Lives Matter.

Gangs, commonly (and legally) defined as groups of three or more people who share common objectives (mostly criminal in nature), use violence to achieve them, occupy certain territory i.e., turf obtained more by infiltration than invitation, and create structured hierarchies and requirements for initiation into (e.g., committing a violent crime) and advancement through the ranks (e.g., taking out a rival) to positions of higher authority.

They may be based on age (youth gangs), race, ethnicity or peculiar ideology, and most wear identifying "colors" and other sartorial accoutrement that identify them and set them apart from their adversaries. Many also use phrases and hand signals or gestures reflecting their own code of communication that trained law enforcement investigators spend careers trying to decipher. For many, gang membership offers a sense of identity, structure and belonging that more traditional social institutions (e.g., family, school, the military) apparently failed to provide. (See *GANG SIGNS: A LEXICON OF VIOLENCE*, by Michael Ellmer, Senior Intelligence Analyst for Gray Dynamics, a London-based private intelligence firm, 9/15/22, graydynamics.com).

MEMBERS ONLY: EVIDENCE OF GANG AFFILIATION/ACTIVITY IN TRIALS

Not surprisingly, criminal defense attorneys who represent clients with gang ties dread the introduction of such information into evidence for fear that the jury will draw all the negative inferences that such membership offers including drug dealing, gun violence and terrorizing law-abiding citizens. In other words, as with prior bad act evidence generally (see *People v Molineux*, 168 NY 986 [1901]), the concern is always that the defendant will be convicted based on his/her perceived propensity for criminality, and the more heinous the priors, the more likely there will be a finding of guilt.

Nevertheless, while an accused's gang association/activity CANNOT (and should not) be admitted simply to paint the defendant as a criminal, it can, within the court's exercise of discretion upon a showing of relevance to a material issue and probative value that outweighs the risk of unfair prejudice, be brought out for the jury's consideration (*People v Cass*, 18 NY3d 553 [2012]),

Of course, when that occurs, counsel should request (and the court should give) a limiting instruction which juries are expected to follow. Whether they actually ignore all the negative connotations of gang affiliation and limit their focus to things like motive, intent, nature of relationships is a mystery. As with prior bad act evidence generally, such evidence should be addressed in limine, and if the People are given the green light to go forward, counsel should be sure to address the "gang issue" with prospective jurors during voir dire.

NEW YORK ADVISORY EVIDENCE RULE 4:33 EVIDENCE OF GANG MEMBERSHIP AND ACTIVITY

1. This rule states that evidence of gang activity and a defendant's membership therein is INADMISSIBLE IF IT CANNOT BE LOGICALLY CONNECTED TO A SPECIFIC MATERIAL ISSUE IN THE CASE and tends only to demonstrate the defendant's propensity to commit the crime charged.

The requisite connection can exist, and evidence of the defendant's gang membership CAN BE ADMITTED when such membership: a. provides a MOTIVE for the crime charged (e.g., rivalry, pay back, advancement up the ranks), b. is INEXTRICABLY INTERWOVEN with the crime charged (e.g., assaulting a fellow member for disloyalty to the gang), c. is NECESSARY TO EXPLAIN THE RELATIONSHIPS of the individuals involved, or d. provides background information relevant to the commission of the crime charged or its participants. The PROBATIVE VALUE must also outweigh the PREJUDICIAL EFFECT.

2. When evidence of gang membership reveals, directly or indirectly, the commission of CRIMES, WRONGS OR BAD ACTS a LIMITING INSTRUCTION EXPLAINING THE REASON FOR THE USE OF SUCH EVIDENCE IS WARRANTED. Again, counsel should be sure to request such an instruction rather than rely on the court doing so of its own accord.

SOME CASES

In *People v Kims* (24 NY3d 439 [2014]), the Court of Appeals held that it was error to admit testimony from a drug purchaser that the defendant who offered to sell him cocaine stated that he was a member of the Crips (and wore a signature bandanna) because there was no evidence that such affiliation had anything to do with the transaction.

As the Court saw it, the gang references provided no background information as to the origin of the drugs found in the defendant's apartment (where he resided in violation of parole), they did not explain the relationship of the parties, nor were they interwoven with the charges (citing, inter alia, *People v Faccio*, 33 AD3d 1061 [3rd Dept 2006]).

The error was deemed HARMLESS, however, in view of what the Court considered to be overwhelming evidence of guilt.

The Court did reverse the defendant's convictions for Criminal Possession of a Controlled Substance 1st and 3rd degrees because the trial court erroneously instructed the jury on the DRUG FACTORY presumption (PL 220.25[2]) where there was no evidence that he was in close proximity to a large quantity of drugs found in open view.

In *People v Bailey* (32 NY3d 70 [2018]), by contrast, the Court, in affirming the defendant's conviction for Assault 2nd degree, found that testimony from the victim about the defendant (and codefendant's) membership in the Bloods and use of gang lingo was relevant to explain the relationship between the two of them and to shed light on why they both joined in the assault after the victim (a fellow inmate with whom they had argued) demanded a one-on-one fight.

In particular, when the victim (whom the defendant claimed had a shank) demanded a fair fight, the co-defendant said, "Power Blood Rules!" which the victim said was Blood speak for "all for one and one for all."

The trial court also permitted an investigator familiar with gangs to testify about the Blood behavior and language to provide context for the group involvement by the defendant, co-defendant (and a third member who joined the fray) in the beating of the victim. The Court of Appeals held that such evidence was relevant to background, explaining relationships and to motive. The expert testimony was limited, and the court gave a cautionary instruction as to the limited purpose of the gang-related evidence. (citing *People v Kims*, supra and *People v Agina*, 18 NY 316 [2012]).

A more contentious issue involved a juror who threatened to walk out of the trial if defense counsel, in an apparent attempt at provocation, kept asking the victim whether the co-defendant set him off by calling him "an old N..." Concerned that the antagonism might spill onto the defendant, counsel moved for a mistrial, claiming that the juror was grossly unqualified.

Although the People offered their consent to discharge and replace the juror and the co-defendant so moved, the court, without inquiring of the juror, denied the motion and instructed the jury that anyone who could not still be fair and impartial, should speak up or hold their peace. Curiously, defense counsel did not request an inquiry of this juror nor, in the majority's view, did he request her removal from the panel. (Claiming that the juror was grossly unqualified would seem to suggest a desire for her removal).

Consequently, the Court deemed the issue unpreserved (a conclusion which the dissenter deemed unsupported by the record) inasmuch as the defendant did not object in his own right and could not piggyback on co-counsel's protest (citing, inter alia, *People v Jackson*, 29 NY3d 18 [2017]). The Court also found that the matter was otherwise adequately addressed by the trial court's admonition to the jury.

In *People v Hilts* (187 AD3d 1408 [3rd Dept 2020]), the Third Department affirmed the defendant's conviction for Criminal Possession of a Weapon 2nd degree based largely on the testimony of a Bloods enforcer turned informant who stated that he had met the defendant (a member of Bloods Nation) in a parking lot (confirmed by video surveillance) where the defendant (referred to as "Jahiem") offered to sell him a .40 caliber handgun.

He then referred the CI to his underling, "Kenny" who showed the CI the gun (at a gang house) after which the sale was eventually consummated (following extended haggling over price).

The Court held that evidence of the informant's status was relevant to explain why the FBI utilized his services and to demonstrate why the informant felt comfortable with the defendant who was high enough on the Blood's food chain to use an underling (Kenny) to do the deal, thereby insulating himself from direct involvement in the illicit transaction. In short, such evidence was deemed to have been properly admitted as BACKGROUND INFORMATION and to EXPLAIN THE RELATIONSHIP OF THE PARTICIPANTS IN THE SALE (citing *People v Bailey*, supra). (In contrast, see *People v Argueta*, 194 AD2d

857 [2nd Dept 1993]: Accomplice testimony was insufficient without independent corroborating evidence to uphold drug conviction on the theory that the accomplice sold drugs alleged to have been supplied by the defendant).

GANG ASSAULT

While the admissibility of gang-related evidence requires a showing of relevance to material issues and probative value not outweighed by unfair prejudice, the crimes of GANG ASSAULT 1st and 2nd degrees (Penal Law § 120.07 and 120.06) do NOT require proof of the defendant's membership or involvement in a particular gang as described above. Rather, it is the NUMBER of participants involved that can transform a garden variety assault (with multiple actors) into something that, as a titular matter, may sound much more nefarious than necessary.

The elements of Assault 1st degree, a class B violent felony, include an INTENT to cause SERIOUS PHYSICAL INJURY (SPI) to another person, being AIDED BY TWO OR MORE PERSONS ACTUALLY PRESENT (i.e., in a position to provide assistance) and CAUSING SPI to such other person or a third person.

Assault 2nd degree, a class C violent felony, is virtually identical to 1st degree except that the INTENT is to cause only PHYSICAL INJURY (PI) (but the resulting injury is SPI).

Interestingly, as with Robbery 2nd Degree (Penal Law § 160.10[2]), the two or more persons who aid the offender need NOT share his/her intent (to cause SPI or PI) for the defendant to be found guilty of Gang Assault. All that is required is that they render assistance KNOWINGLY (See *People v Sanchez*, 13 NY3d 554 [2009]). Consequently, unless the defendant is charged with ACTING IN CONCERT with the others, a corroboration instruction is NOT necessary (See *People Dennis*, 75 NY2d 821 [1990], *People v Bishop*, 117 AD3d 430 [1st Dept 2014]).

FINAL THOUGHT

By any reckoning, proof of a client's membership in or activities carried out on behalf of a gang is detrimental to the defense. Jurors, like most people, fear gangs and all the lawlessness they represent (even if they hold annual Toys-for-Tots cross country motorcycle rides). So whenever possible, absent a clear and specific showing of RELEVANCE to a MATERIAL ISSUE and the absence of UNFAIR PREJUDICE, such evidence should be vigorously resisted.