

Prompt investigation, including the review of surveillance video from Best Buy and other stores in the area, led police to suspect that a car operated by Shania Craven was involved in the shooting. Although she initially denied any knowledge of the incident, Craven eventually gave incriminating evidence against Jeremy Foster (her cousin) and Appellant. At Appellant's trial, Craven testified that Foster and Appellant used her car to follow someone to the Best Buy store. Foster was driving the car, with Appellant and Craven as passengers. According to Craven, Foster drove the car to the side of the building. Appellant got out, walked around to the storefront, and returned to the car a short time later. Foster sped away. Appellant told Foster, "Bro, I got him" and "Don't let them catch us." Appellant described how he hid in the parking lot, then approached the store and fired several shots at his target, while the victim's brother, who was with him, ran inside the store.

Appellant does not challenge the sufficiency of the evidence to support his convictions. He does, however, claim that certain evidence and argument, and the lack of a particular jury instruction, denied him a fair trial. In Proposition I, he claims the trial court erred by allowing police testimony concerning criminal gangs active in the Tulsa area. Before trial, the State gave written notice of its intention to offer evidence of gang culture. *Cf. Burks v. State*, 1979 OK CR 10, ¶ 12, 594 P.2d 771, 774 (requiring the State to give pretrial notice of its intent to offer evidence of the defendant's other crimes or bad acts). The trial court held an extensive hearing on the matter, found the evidence "more than clear and convincing" that Appellant was a gang member, and concluded that a "brief

explanation of [gang] culture” would help the jury understand the apparent motive for the shooting. The testimony Appellant complains of was presented at trial chiefly through Sergeant Sean Larkin of the Tulsa Police Department’s Gang Unit. Appellant did not object to these comments at trial, so we review them only for “plain error.” *Hogan v. State*, 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923. To obtain relief under this standard, Appellant must show an actual deviation from a legal rule which is plain and obvious, and which affected his substantial rights, *i.e.*, the outcome of the proceeding. *Id.*

Evidence is relevant if it tends to make the existence of a material fact more or less probable. 12 O.S.2011, § 2401. Relevant evidence should be admitted unless its probative value is substantially outweighed by unfair prejudice. 12 O.S.2011, § 2403. Evidence implicating the accused in other crimes or bad acts may be admitted if necessary to explain a motive for the charged crime. 12 O.S.2011, § 2404. Evidence touching upon gang culture often serves that purpose. *See e.g. Thompson v. State*, 2007 OK CR 38, ¶ 34, 169 P.3d 1198, 1209.

The testimony concerning gang culture in the Tulsa area dovetailed with the eyewitness testimony of Shania Craven. Craven testified that after the shooting, Appellant said he hoped to “get a stripe” for shooting Norman. Sergeant Larkin testified that Appellant was associated with a particular gang in the Tulsa area, and that the intended victim, Norman, was associated with a rival gang. He explained that gang members gain respect and authority by committing violent crimes, and that “getting a stripe” was a term for this achievement. More to the point, Larkin’s knowledge of area gangs suggested the precise motive for

Norman's murder: to avenge specific acts of violence committed by Norman's gang against Appellant's gang.¹ The record shows that the trial court was extremely conscientious about keeping the gang-culture testimony relevant and to a minimum, to avoid unfair prejudice. The testimony presented was clearly relevant to explain the motive behind the shooting. Moreover, the trial court cautioned the jury on the limited use of this evidence when it was presented. The trial court did not abuse its discretion in admitting this evidence. *Douglas v. State*, 1997 OK CR 79, ¶¶ 70-73, 951 P.2d 651, 673. Proposition I is denied.

In Proposition II, Appellant claims the trial court erred in failing to caution the jury on the credibility issues inherent in informant testimony. See OUI-CR (2nd) No. 9-43. Appellant claims that because Shania Craven was initially threatened with charges in connection with the murders, she had much to gain from testifying in a manner pleasing to the prosecution. Defense counsel did not request such an instruction, so we review only for plain error. *Hogan*, 2006 OK CR 19, ¶ 38, 139 P.3d at 923. Appellant argues that Craven was an informant, though he does not specify what, if anything, she had been promised in exchange for her cooperation in testifying against him. We need not decide whether Craven

¹ To summarize the saga: Larkin testified that Scott Norman, a member of a local gang, was shot in May 2008, but survived. Tajuan Davis, a.k.a. "Hyphy," who belonged to a rival gang, was suspected of being involved in that shooting. In July 2008, Davis was murdered; Scott Norman and Bryan Mitchell were suspects in that killing. Mitchell was murdered July 2011. When he was arrested in this matter, Appellant was wearing certain colors associated with the gang that Davis, or "Hyphy," belonged to. Larkin testified that the anniversary dates of murders were significant to the gangs, so it may have been no coincidence that Davis was killed on July 9, 2008, Mitchell was killed on July 10, 2011, and the shootings in this case took place on July 14, 2012. According to Craven, Appellant said that as he fired the fatal shots he proclaimed, "G.I.P. Hyphy." Larkin testified that "G.I.P." was an acronym for "Grooving in Peace" or "Gangsta in Paradise," and used in remembrance of fellow gang members who had died. Thus, it was reasonable to infer that Appellant intended to kill Norman to avenge the death of Davis, his fallen comrade.

could properly be labeled an “informant,” because we find no reasonable probability that the omission of OUJI-CR (2nd) No. 9-43 affected the outcome of Appellant’s trial. Craven’s situation and possible motive to fabricate were apparent from her testimony. *Blunt v. State*, 1987 OK CR 201, ¶ 10, 743 P.2d 145, 148. The fact that she initially denied any knowledge of the crimes, and was jailed as an accessory and/or a material witness, was made clear in her testimony. The jury was cautioned to consider the possible biases of every witness, including “the interest, if any, which the witness may have in the result of the trial [and] the relation of the witness to the parties.” See OUJI-CR (2nd) No. 10-8. The jury was also reminded that Craven’s testimony was inconsistent with her initial statements to police, wherein she denied any knowledge of the shooting. See OUJI-CR (2nd) No. 9-20. And perhaps most importantly, the jurors were cautioned that Craven could be considered an accomplice to the murders, and that if they so found, her testimony had to be corroborated in some material respect before it could support a conviction. See OUJI-CR (2nd) Nos. 9-25 to 9-29. Craven’s testimony was indeed corroborated by other evidence, including surveillance video of the shooting itself and other activities of Craven, Foster, and Appellant prior thereto.² See *Howell v. State*, 1994 OK CR 62, ¶ 31, 882 P.2d 1086, 1094. We find no plain error here. *Gilbert v. State*, 1988 OK CR 289, ¶ 10, 766 P.2d 361, 363. Proposition II is denied.

² Surveillance video from the Best Buy parking lot shows the gunman hiding behind a parked car just before the shooting, just as (according to Craven) Appellant said he had done. Appellant is left-handed, and the video shows the gunman shooting with his left hand. Norman’s companion, his brother Jermarcho Norman, is seen running into the store when the shots are fired, just as Appellant allegedly described. An eyewitness’s description of the gunman generally matched Appellant’s physical description.

In Proposition III, Appellant complains that the prosecutor incited societal alarm in his questions and closing comments relating to the street-gang culture in Tulsa. Again, we review only for plain error, as defense counsel did not object to these statements at the time. *Jones v. State*, 2009 OK CR 1, ¶ 76, 201 P.3d 869, 888. The testimony about street gangs was properly admitted to help the jury understand certain aspects of the case and statements by the participants, and principally to establish a motive for the crimes.³ See Proposition I. Thus, the prosecutor's questions on the subject were entirely proper. The only comment from closing argument that Appellant finds objectionable is this:

You are here to look at the evidence in a cold, dispassionate way so that you dispense due process. Due process. That was something that was denied to Scott Norman; something that was denied to Bryan Mitchell.⁴ This is not about retaliation. This is about seeking justice... .

Appellant claims this comment incited societal alarm. The fact that Appellant would fire gunshots into the entrance of a busy retail establishment, putting many innocent people at risk, to avenge someone else's death and gain respect among his peers in the process, was alarming in itself. When read as a whole, the prosecutor's arguments do not ask the jury to punish Appellant for anything but his own actions. See *McElmurry v. State*, 2002 OK CR 40, ¶¶ 151-52, 60 P.3d 4, 34 (arguments improperly appealing to "societal alarm" are those which ask the jury to make an example of the defendant). The comments Appellant

³ As to the evidence of gang-related motive, the prosecutor reminded the jury: "The Court has instructed you on the use of gang testimony. ... [Y]ou can't say, 'Okay, this guy is a gang-banger; he's a bad guy, and so he killed somebody else.' But you can use the evidence with regard to his gang involvement to show motive and intent."

⁴ Mitchell was another victim in this gang feud. See footnote 1.

complains of did not affect his substantial rights. *Hogan*, 2006 OK CR 19, ¶ 91, 139 P.3d at 936. Proposition III is denied.

In Proposition IV, Appellant claims his defense counsel at trial performed deficiently because he failed to object to evidence concerning criminal gangs (see Proposition I), failed to request an instruction on informant credibility (see Proposition II), and failed to object to the prosecutor's questions and argument touching upon gang violence (see Proposition III). We presume that counsel performed competently; it is Appellant's burden to show that counsel's acts or omissions (1) were unreasonable under prevailing professional norms, and (2) caused prejudice, *i.e.*, that they undermine confidence in the outcome of the trial. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Underwood v. State*, 2011 OK CR 12, ¶ 77, 252 P.3d 221, 250. We have already found that evidence of gang culture was limited, relevant, and entirely proper, that the prosecutor's comments on that evidence were also proper, and that the lack of a cautionary instruction on informant credibility was unnecessary. Having found no reasonable probability that any of the preceding claims of error affected the outcome of Appellant's trial, we cannot find trial counsel ineffective. *Phillips v. State*, 1999 OK CR 38, ¶ 103, 989 P.2d 1017, 1043 (when a claim of ineffective counsel can be disposed of on the ground of lack of prejudice, that course should be followed). Proposition IV is therefore denied.

DECISION

The Judgment and Sentence of the District Court of Tulsa County is **AFFIRMED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal*

Appeals, Title 22, Ch.18, App. (2015), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY
THE HONORABLE WILLIAM J. MUSSEMAN, JR., DISTRICT JUDGE

ATTORNEYS AT TRIAL

ADAM HASELGREN
VELIA LOPEZ
ASSISTANT PUBLIC DEFENDERS
423 SOUTH BOULDER AVENUE
TULSA, OK 74103
COUNSEL FOR DEFENDANT

TIM HARRIS
DISTRICT ATTORNEY
MICHELLE KEELY
ASSISTANT DISTRICT ATTORNEY
500 S. DENVER
TULSA, OK 74103
COUNSEL FOR THE STATE

ATTORNEYS ON APPEAL

RICHARD COUCH
ASSISTANT PUBLIC DEFENDER
TULSA COUNTY
PUBLIC DEFENDER'S OFFICE
423 BOULDER AVE., STE. 300
TULSA, OK 74103
COUNSEL FOR APPELLANT

E. SCOTT PRUITT
ATTORNEY GENERAL OF OKLAHOMA
LORI S. CARTER
ASSISTANT ATTORNEY GENERAL
313 NE 21ST STREET
OKLAHOMA CITY, OK 73105
COUNSEL FOR APPELLEE

OPINION BY: SMITH, P.J.

LUMPKIN, V.P.J.: CONCUR
JOHNSON, J.: CONCUR
LEWIS, J.: CONCUR
HUDSON, J.: CONCUR