# STATE OF MICHIGAN

# COURT OF APPEALS

---

In re Kevin Raymond Newman

---

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff–Appellee,

v

KEVIN RAYMOND NEWMAN,

Defendant–Appellant.

UNPUBLISHED
December 13, 1996

No. 180511
St. Clair County
LC No. 93-345

---

Before: Jansen, P. J., and Reilly and E. Sosnick,* JJ

PER CURIAM.

Defendant was convicted in the juvenile division of probate court of unlawful assembly, MCL 752.543; MSA 28.790(3), and was committed to the Department of Social Services pursuant to an order of disposition in these delinquency proceedings. He appeals as of right. We affirm.

Defendant's conviction arose from his participation in a gathering of gang members in a public park in Port Huron. There, he took part in a confrontation between approximately thirty gang members and three police officers. The officers testified that they felt that their safety was in danger. Nearby residents who witnessed the incident also expressed their concern for the officers' safety. Ultimately, the group dispersed when additional units from the sheriff's department arrived.

Defendant first argues that the trial court erred in applying a "scintilla of the evidence" standard when deciding his motion for a directed verdict for acquittal.

---

* Circuit judge, sitting on the Court of Appeals by assignment.

> In order to take this out of the hands of the jury, however, there must be a scintilla of evidence that they might arrive at either guilty or innocent. And I think, frankly, without the personal identification of each one of you, whether it was true or untrue, could cause them to come back and have a guilty verdict.[sic] I'll not take this out of the hands of the jury because there is a scintilla of evidence that indicates that either one or both of you were involved. And, frankly, I don't know I wasn't there.
>
> So I'm not going to take it out of the hands of the jury because there is – there are facts that would constitute the grounds for coming back with a guilty verdict. So the motions are denied. We'll proceed with trial.

This Court, when reviewing a trial court's decision on a motion for directed verdict, views the evidence presented up to the time the motion was made in the light most favorable to the prosecution to determine if a rational decisionmaker could find the essential elements of the crime proven beyond a reasonable doubt. *People v Daniels*, 192 Mich App 658, 665; 482 NW2d 176 (1991). Although the trial court made reference to a "scintilla of evidence standard" and it is not the correct standard, the trial court subsequently applied the correct standard in determining defendant's motion when it referred to whether there are facts that would constitute the grounds for coming back with a guilty verdict. Accordingly, we conclude that the court's reference to the incorrect standard does not require reversal.

Defendant next argues that the trial court erred in denying his motion for a directed verdict of acquittal. First, defendant maintains that the element of public terror or alarm exists only when a segment of the public, not including the police, is put in fear of injury. Defendant relies on *People v Garcia*, 31 Mich App 447; 187 NW2d 711 (1971). However, the facts in *Garcia* do concern the safety of a police officer at the scene of an unlawful assembly. In any event, construing the statute to exclude police officers would create an arbitrary distinction, which is especially unwarranted given the policy objectives of public safety advanced by the unlawful assembly statute.

Second, defendant argues that his intent was not established. We disagree. The statute that prohibits unlawful assembly, MCL 752.543; MSA 28.790(3) states as follows:

> It is unlawful and constitutes an unlawful assembly for a person to assemble or act in concert with 4 or more persons for the purpose of engaging in conduct constituting the crime of riot, or to be present at an assembly that either has or develops such a purpose and to remain thereat with intent to advance such purpose.

The crime of riot is defined by MCL 752.541; MSA 28.790(1), which states:

> It is unlawful and constitutes the crime of riot for 5 or more persons, acting in concert, to wrongfully engage in violent conduct and thereby intentionally or recklessly cause or create a serious risk of causing public terror or alarm.

Viewing the evidence in the light most favorable to the prosecution, we conclude that a rational finder of fact could determine beyond a reasonable doubt that defendant was present at an assembly that developed the purpose to engage in conduct constituting the crime of riot, and that defendant remained at the assembly with intent to advance such purpose. One officer testified that he specifically recalled defendant yelling "O.C.G. [Out Cold Gang] rules" roughly five times during the confrontation. A rational trier of fact could infer defendant's intent in yelling in support of his gang in these circumstances was to advance the gang's purpose to engage in a riot.

Defendant also argues that the trial court erred when it allowed the prosecution to call a witness to testify as an expert in gang activities. We conclude that this testimony was proper. This Court will reverse a defendant's conviction for the improper admission of evidence at trial only if an unprejudiced person, considering the facts before the trial court at the time of the motion, would say that no justification existed for the ruling made, and that the trial court therefore abused its discretion. *People v McAlister*, 203 Mich App 495, 505; 513 NW2d 431 (1994). The expert's testimony relating to hand signals and gang apparel was relevant to establish the "assembled" and the "acting in concert" elements of the crime of unlawful assembly and, therefore, was relevant. This information was used for a limited purpose, and the trial court gave a limiting instruction to further enforce its limited use. We recognize that the expert referred to the illegal activities of other gangs in the course of his testimony. To the extent that defendant is arguing that he was prejudiced because the expert did not differentiate between these other gangs and defendant's gang, we find no error on the part of the trial court. Defense counsel made no effort to differentiate between defendant's group and the other groups to which the expert referred. Defense counsel's failure to explore this line of questioning does not demonstrate that the trial court abused it discretion by admitting the testimony of this witness.

Finally, defendant contends that he was deprived of a fair trial when the prosecutor questioned witnesses about their fear of retribution by the gang for their testimony. Defendant claims this questioning was inflammatory and prejudicial. We agree that the questions were improper. It is well accepted that the prosecution may not, without foundation, attempt to use innuendo to intimate that a witness is being intimidated by the defendant or the defendant's family. *People v Osborne*, 75 Mich App 600, 602; 256 NW2d 45 (1977). In this case, no attempt was made by the prosecution to lay a foundation showing a direct link between fear of retribution felt by the witnesses and any actual threats made by defendant or his gang. However, we conclude that the error was harmless. The questioning was not so offensive to the maintenance of a sound judicial process that it could never be viewed as harmless. *People v Minor*, 213 Mich App 682, 687; 541 NW2d 576 (1995). Defendant was not denied any basic element of a fair trial, and based upon our review of the evidence, the questioning and the witnesses' responses could not have had any effect on the verdict. Therefore, the error was harmless beyond a reasonable doubt. *People v Morton*, 213 Mich App 331, 335; 539 NW2d 771 (1995).

Affirmed.

/s/ Kathleen Jansen
/s/ Maureen Pulte Reilly
/s/ Edward Sosnick