

GANG AFFILIATION

You have heard testimony about an alleged gang affiliation in this case. I instruct you that you cannot use any evidence that the defendant [was] [may have been] affiliated with [a gang] [people who belong to a gang] to infer anything about the defendant's character or general propensity to commit a crime. Such evidence, standing alone, does not make the defendant more likely to have (committed a crime), (or) (acted violently).

Evidence of the defendant's alleged gang affiliation was admitted only for a limited purpose(s): to demonstrate [their motive for committing the offense(s) involved] (and/or) [their participation in a joint venture] and for no other purpose. You may not take that evidence as a substitute for proof that the defendant committed the crime(s) charged, nor may you consider it as proof that the defendant has a bad character or a propensity to commit crimes.

SUPPLEMENTAL INSTRUCTIONS

In cases where there is evidence that the defendant believed someone else was affiliated with a gang:

If there was credible evidence that the defendant

believed someone was affiliated with a gang, that alone is not evidence that the person was, indeed, a gang member. Therefore, you may not use that evidence to infer that the person was a gang member. Such evidence was admitted solely on the issue of the defendant's state of mind for what the defendant believed, at a particular time, and for no other purpose.

Commonwealth v. Maldonado, 429 Mass. 502, 505 (1999).

In cases where there is testimony from an "expert" about indicia of gang affiliation:

When a case involves allegations of gang affiliation, a person with special training or experience in that subject matter is permitted to give their opinion about that matter, in order to help you as the jury. However, an expert witness is like any other witness in that you alone make the judgement about how much credibility and weight you give the expert's testimony and what conclusions you draw from that testimony.

See Instruction 3.640 Expert Witness.

If the court inquired of venire about gang affiliation during empanelment:

I caution you and remind you of the promise you made under oath when you were questioned before being sworn in as a juror. You promised that you would not allow any suggestion of gang association to affect your ability to remain fair and impartial as a juror in this case, and you must follow that promise in your deliberations.

See *Commonwealth v. Rosario*, 460 Mass. 181, 192 (2011) *Commonwealth v. Maldonado*, 429 Mass. 502, 506 n. 1 (1999) for example of a comprehensive limiting instruction. See also *Massachusetts Jury Trial Benchbook*, (4th Edition, 2019), Appendix 4DD – Sample Jury Instruction on Gang Affiliation or Involvement.

NOTES:

1. **Relevance and admissibility.** “Gang evidence may be admissible to show motive or to establish joint venture.” *Commonwealth v. Akara*, 465 Mass. 245, 267 (2013), citing *Commonwealth v. Swafford*, 441 Mass. 329, 332-333 (2004). “If gang affiliation is the motive for a [crime], then ‘evidence of gang affiliation is relevant to the defendant’s motive and state of mind.’” *Commonwealth v. Fernandes*, 492 Mass. 469, 486 (2023), quoting *Commonwealth v. Maldonado*, 429 Mass. 502, 504 (1999). Gang affiliation may also be admitted “for the purpose of establishing joint venture in cases where the evidence showed that the offense involved retaliation or conflict between rival gang members ... and that the defendants therefore shared a common motive.” *Akara*, 465 Mass. at 268 (evidence limited to common identifying symbols in graffiti and clothing was properly admitted where it went to the issue of the defendants’ relationship to one another in joint venture case).

The Supreme Judicial Court has “urged caution in admitting gang-related evidence because of the risk of suggesting that the defendant may have a propensity for criminality or violence.” *Commonwealth v. Lopes*, 478 Mass. 593, 604 (2018). “[C]ommunity attitudes towards gang violence are likely to color such evidence.” *Akara*, 465 Mass. at 267-268. Thus, it is imperative for the court to weigh the probative value of the evidence against its potentially prejudicial effect in exercising its discretion to admit evidence of gang affiliation. See *Commonwealth v. Carter*, 488 Mass. 191, 206-207 (2021); *Commonwealth v. Gray*, 463 Mass. 731, 753 (2012); Mass. G. Evid. § 404(b) (2021).

In order to limit the potential prejudice of gang affiliation, “the judge has a responsibility to minimize the potential prejudicial nature of the evidence through devices such as voir dire of prospective jurors and limiting instructions.” *Commonwealth v. Leng*, 463 Mass. 779, 783 (2012).

2. **Jury empanelment.** In a case where evidence may be admitted that one or more defendants or witnesses were involved or affiliated with a gang, it is proper for the court to question potential jurors individually about their ability to remain fair and impartial. See *Commonwealth v.*

Swafford, 441 Mass. 329, 333 (2004) (judge asked potential jurors whether evidence “that the defendants may have been associated with an alleged gang at the time of the crimes alleged” would “affect their ability to be fair and impartial”); *Commonwealth v. Correa*, 437 Mass. 197, 201 (2002).