

IN THE SUPREME COURT OF THE STATE OF NEVADA

PASQUEL LOZANO A/K/A PASQUAL  
LOZANO,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 48603

**FILED**

JUN 30 2008

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY S. Young  
DEPUTY CLERK

ORDER OF AFFIRMANCE

Appeal from a judgment of conviction, upon a jury verdict, of one count of first-degree murder with the use of a deadly weapon and two counts of attempted murder with the use of a deadly weapon. Eighth Judicial District Court, Clark County; Valerie Adair, Judge.

This case stems from a gang shooting in which errant bullets entered an apartment courtyard and killed a nine-year old girl and wounded her younger sister. Appellant Pasquel Lozano was tried and convicted of first-degree murder in a previous proceeding. Following a new trial, Lozano was convicted of first-degree murder and two counts of attempted murder. On appeal, Lozano challenges these convictions on multiple grounds. For the following reasons, we conclude that each of Lozano's arguments fail and therefore affirm the judgment of the district court. The parties are familiar with the facts and we do not recount them here except as necessary to our disposition.

Gang affiliation evidence

Lozano claims that the district court improperly permitted Robert Valentine to testify that a member of Lozano's group flashed a "C" gang sign at him before shots were fired in his direction. Separately, Lozano argues that the district court improperly admitted testimony of

Lozano's gang involvement. We disagree and conclude that admitting this evidence was not an abuse of discretion.<sup>1</sup>

While inadmissible to prove character, evidence of other crimes, wrongs or acts are admissible for other independently relevant purposes such as motive.<sup>2</sup> Although the nexus between Lozano and Genesis Gonzalez—the child victim—is irrelevant in this case of transferred intent, the gang nexus between Lozano and Valentine—his intended victim—is clearly relevant to Lozano's motive for firing at Valentine as he fled through the courtyard where Gonzalez was playing.<sup>3</sup>

Moreover, we agree with the district court that this case's gang subtext was closely interconnected with the issues at trial, particularly to understanding why Lozano was armed and in that particular neighborhood and why Lozano selected Valentine as his intended target.<sup>4</sup> Thus, we conclude that admitting Valentine's testimony regarding the "C" gang sign was not improper.<sup>5</sup>

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<sup>1</sup>Archanian v. State, 122 Nev. \_\_\_, \_\_\_, 145 P.3d 1008, 1016 (2006) (evidentiary rulings are reviewed for an abuse of discretion and will be given deference unless manifestly wrong).

<sup>2</sup>NRS 48.045(2).

<sup>3</sup>See Tinch v. State, 113 Nev. 1170, 1176, 946 P.2d 1061, 1065 (1997) (gang affiliation evidence is relevant and not substantially outweighed by unfair prejudice when it tends to prove motive).

<sup>4</sup>Cf. NRS 48.035(3); Ochoa v. State, 115 Nev. 194, 200, 981 P.2d 1201, 1205 (1999) (allowing evidence of prior drug transactions between victim and defendant to show history of friction escalating to murder).

<sup>5</sup>Because it hinges on the propriety of admitting Valentine's testimony regarding the "C" gang sign, we conclude that Lozano's  
*continued on next page . . .*

Separately, Lozano argues that the district court improperly permitted Detective Leonard Taylor to testify regarding Lozano's and Valentine's affiliation with rival gangs.<sup>6</sup> However, prior to permitting Taylor to testify, Lozano called Valentine's mother, Tonya Baker, who testified that that she was unaware of any conflict between Valentine and Lozano and that the two—who were childhood friends—had been together weeks before the shooting. Although up to this point gang affiliation evidence was limited to the "C" gang sign, since Baker's testimony suggested that Lozano lacked a motive to harm Valentine, we conclude

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*... continued*

challenge to the denial of his motion to convene a new venire because of jurors' prior exposure to this case's gang subtext is meritless. Likewise, because Valentine's testimony was already before the jury, and the district court limited the use of any gang affiliation evidence to the issue of motive, Darien Moten's inadvertent reference to Valentine as a "Blood" was harmless. Thus, we conclude that it was not an abuse of discretion to deny Lozano's motion for a mistrial based on this spontaneous reference.

Separately, on this record, we conclude that any error in failing to conduct a full Petrocelli hearing on the admissibility of Valentine's testimony was harmless. See Qualls v. State, 114 Nev. 900, 903-04, 961 P.2d 765, 767 (1998) (holding that the failure to conduct a Petrocelli hearing is harmless where the record is sufficient to determine that (1) the act is relevant to the crime charged, (2) proven by clear and convincing evidence, and (3) the act's probative value is not outweighed by the danger of unfair prejudice).

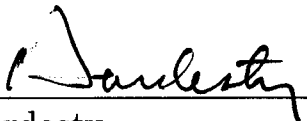
<sup>6</sup>Although Taylor improperly referred to field interview cards several times during his testimony, we conclude that denying Lozano's motion for a mistrial on this basis was not an abuse of discretion since these alleged references to Lozano's prior criminal history were apparently inadvertent and surprised even the State. See Thomas v. State, 114 Nev. 1127, 1142, 967 P.2d 1111, 1121 (1998).

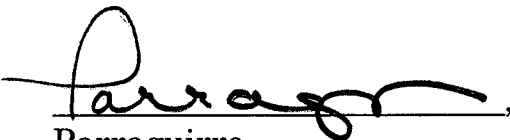
that the door was open for the State to refute that inference with evidence of rival gang membership.<sup>7</sup>

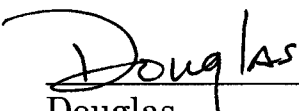
Conclusion

Based on the above, we conclude that each of Lozano's arguments on appeal lacks merit.<sup>8</sup> Accordingly, we

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, J.  
Hardesty

  
\_\_\_\_\_, J.  
Parraguirre

  
\_\_\_\_\_, J.  
Douglas

cc: Hon. Valerie Adair, District Judge  
Special Public Defender David M. Schieck  
Attorney General Catherine Cortez Masto/Carson City  
Clark County District Attorney David J. Roger  
Eighth District Court Clerk

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<sup>7</sup>Cf. U.S. v. Whitworth, 856 F.2d 1268, 1285 (9th Cir. 1988).

<sup>8</sup>Lozano also raises separate challenges relating to the performance of an in-court photo identification, the admission of a full-body autopsy photo of the child victim, the denial of Lozano's motion for a mistrial based on the State's inadvertent reference to his first trial, the sufficiency of the evidence supporting his first-degree murder conviction, the admission of certain recanted statements as substantive evidence, and cumulative error. After careful review, we conclude that none of these separate arguments warrant reversal.