

IN THE SUPREME COURT OF THE STATE OF NEVADA

MARIANO MADRID,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 50115

FILED

MAY 01 2009

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

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of murder with the use of a deadly weapon with intent to promote, further or assist a criminal gang. Eighth Judicial District Court, Clark County; Donald M. Mosley, Judge. Appellant Mariano Madrid was sentenced to life in prison with the possibility of parole after twenty years with an equal and consecutive term for the use of a deadly weapon.

On August 22, 2005, the State filed an information charging Madrid with one count of murder with the use of a deadly weapon with the intent to promote, further or assist a criminal gang. During the trial, in order to prove the gang enhancement, the State sought to introduce a CD containing two rap songs sung by Madrid. Madrid's only objection to the CD was that its prejudice greatly outweighed its probative value.¹ See NRS 48.035. The district court conducted a brief hearing on the record

¹When the State moved to admit the CD at trial, the district court specifically asked Madrid's counsel if he had any other objections to its admission. Counsel replied that he had no objection other than the statements already made.

after which it determined that the CD's probative value outweighed its prejudice and that the CD was thus admissible. It appears from the record that Madrid's song, "Bullet Holes," was played twice to the jury, but that no other songs from the CD were played.

At the conclusion of trial, the jury returned a verdict of guilty and Madrid filed a motion for new trial.² Therein, Madrid argued for the first time that the CD constituted impermissible character evidence in violation of NRS 48.045(1) and impermissible evidence of prior bad acts in violation of NRS 48.045(2). The district court denied the motion, holding that the CD "did not suggest bad acts" and was not character evidence; instead the CD demonstrated motive and helped prove the gang enhancement. Madrid was subsequently sentenced to life in prison with the possibility of parole after twenty years, with an equal and consecutive term for the deadly weapon enhancement. This appeal followed.

The exact nature of Madrid's argument on appeal is unclear. Although his opening brief purports to challenge the denial of the motion for new trial, Madrid makes no argument regarding the propriety of that denial in his brief. Instead, Madrid's argument focuses on alleged errors made at trial; specifically, he argues that the district court erred in admitting the CD without a hearing pursuant to Tinch v. State, 113 Nev. 1170, 1176, 946 P.2d 1061, 1064 (1997), as it constituted evidence of prior bad acts and impermissible character evidence. He also argues, for the first time, that the CD constituted impermissible hearsay evidence.

²It appears from the record that the motion was untimely filed. However, this fact was not addressed by the district court.

Admission of the CD at trial

To the extent that Madrid argues that the trial court erred in admitting the CD at trial, we conclude this argument is without merit. We review a district court's decision to admit or exclude evidence for an abuse of discretion. Thomas v. State, 122 Nev. 1361, 1370, 148 P.3d 727, 734 (2006), cert. denied, ___ U.S. ___, 128 S. Ct. 1061 (2008). A decision that "exceeds the bounds of law or reason," or is "arbitrary and capricious" constitutes an abuse of discretion. Jackson v. State, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001).

At trial, Madrid's only objection to the CD was that its prejudice greatly outweighed its probative value. NRS 48.035 prohibits the introduction of relevant evidence whose probative value is substantially outweighed by the danger of unfair prejudice.

In the song played for the jury, Madrid references various crimes, including robberies and drug deals, and generally describes gangster life (i.e. possession of various guns and "battles" over colors and drugs). The CD is probative of Madrid's membership in a gang and his loyalty to it, as well as his motive and intent, especially in conjunction with the testimony of Detective Hutchinson that rappers often live the lifestyle they rap about. See People v. Zepeda, 83 Cal. Rptr.3d 793, 801 (Ct. App. 2008). Moreover, the CD is not unduly prejudicial as it is unlikely that a juror would be overly influenced by the lyrics, despite their violent nature. Accordingly, we agree that the probative value of the CD was not substantially outweighed by its potential prejudice.

To the extent Madrid argues that the trial court erred in admitting the CD because it is impermissible hearsay, we conclude that claim is also without merit. Because Madrid did not object to the

admission of the CD on the basis of hearsay, we review this claim for plain error. NRS 178.602; Leonard v. State, 117 Nev. 53, 63, 17 P.3d 397, 403-04 (2001).

Hearsay is defined as “a statement offered in evidence to prove the truth of the matter asserted.” NRS 51.035. A statement is “[a]n oral or written assertion,” or nonverbal conduct of a person that is intended to be an assertion. NRS 51.045. Nonverbal conduct is encompassed by the hearsay rule if it is “the equivalent of words expressing [a] belief of the existence of the fact sought to be proved.” State v. Printz, 609 P.2d 570, 573 (Ariz. 1980).

Madrid contends that both the artwork on the CD and the lyrics of the songs constitute hearsay. However, the artwork on the CD case, which primarily consists of an eyeball, looking through what is presumed to be a bullet hole, and a picture of Madrid, does not constitute an assertion of fact. Likewise, the artwork on the CD itself, depicting an unknown man holding a handgun in each hand, does not assert any fact. Thus, the CD artwork does fall within the purview of the hearsay rule.

We also reject Madrid’s contention that the lyrics of the songs constitute hearsay. It appears from the record that only the song “Bullet Holes,” which is sung by Madrid, was played for the jury. Thus, any argument regarding the lyrics of the other songs on the CD is without merit. Moreover, Madrid’s song was introduced into evidence to show Madrid’s knowledge of and involvement in gangs, not to prove the truth of the lyrics. Thus, we conclude that the song lyrics do not constitute hearsay, and the district court did not commit error in admitting the CD.

Denial of the motion for new trial

To the extent that Madrid argues that the district court erred in denying his motion for new trial because the district court failed to hold an adequate hearing before admitting the CD, we conclude that this claim is without merit. Specifically, in the motion for new trial, Madrid argued that the CD was admitted in the absence of an adequate hearing under Tinch v. State, 113 Nev. 1170, 1176, 946 P.2d 1061, 1064 (1997) because it constituted both prior bad act and character evidence.

This court reviews the district court's denial of a motion for new trial for abuse of discretion. Johnson v. State, 118 Nev. 787, 796 59 P.3d 450, 456 (2002). Evidence of a person's character is generally not admissible to prove that he acted in conformity with that character on a particular occasion. NRS 48.045(1). Further, "evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith." NRS 48.045(2). However, such evidence may be admissible for a purpose not concerning the character of the defendant. Id.; Kimberly v. State, 104 Nev. 336, 337, 757 P.2d 1326, 1327 (1998). For example, evidence of other acts may be used to show motive, knowledge or identity. Id. Before such evidence is admitted, the district court must conduct a hearing on the record outside the presence of the jury where it determines that: "(1) the [act] is relevant to the crime charged; (2) the act is proven by clear and convincing evidence; and (3) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice." Tinch, 113 Nev. at 1176, 946 P.2d at 1064.

We agree with the district court that the CD is not a prior bad act. As pointed out by Madrid, the CD is merely a form of "creative


expression,” and cannot be said to constitute an “act.” Further, the CD was not introduced as character evidence. Instead, it was used to show Madrid’s involvement with and knowledge of gangs in order to prove the gang enhancement. Thus, the district court did not err in failing to hold a hearing pursuant to Tinch.³

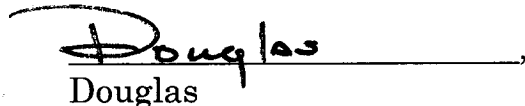
Moreover, even if a hearing was required, failure to conduct a proper hearing does not mandate reversal if (1) this court can determine from the record that the evidence is admissible under the test set forth in Tinch, or (2) “the result would have been the same if the trial court had not admitted the evidence.” Qualls v. State, 114 Nev. 900, 903-04, 961 P.2d 765, 767 (1998). Both of these factors are met here. First, the Tinch test is satisfied because the CD is relevant to show Madrid’s involvement with and knowledge of gangs, Madrid admits that he sang the lyrics to the song “Bullet holes,” and, as discussed above, the probative value of the CD exceeds its prejudice. Thus, under Tinch, the CD is admissible. And exclusion of the CD would not have resulted in a different result at trial. The State introduced substantial evidence proving Madrid’s involvement with gangs including: photos of Madrid posing with other gang members and “flashing” gang hand signs; a photo of Madrid with a spray can in his hand in front of gang graffiti; police records identifying him as a gang

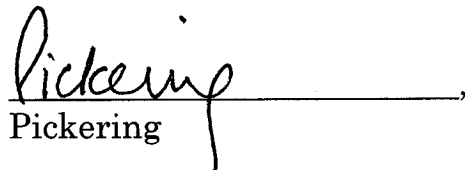
³Madrid also argues that the trial court erred in failing to give a limiting instruction regarding the introduction of the CD. As the CD was not evidence of a prior bad act, no limiting instruction was required. See Tavares v. State, 117 Nev. 725, 731, 30 P.3d 1128, 1132 (2001), holding modified by McLellan v. State, 124 Nev. ___, 182 P.3d 106 (2008). Further, even if a limiting instruction was required, we conclude that any error was harmless. See Johnson v. State, 92 Nev. 405, 407, 551 P.2d 241, 242 (1976).

associate; and a second CD, sung entirely by Madrid, containing songs referencing gang life and killing people. In light of this evidence, we conclude that the district court did not abuse its discretion in denying Madrid's motion for a new trial.⁴

Having concluded that Madrid's claims lack merit, we
ORDER the judgment of conviction AFFIRMED.

 J.
Parraguirre

 J.
Douglas

 J.
Pickering

cc: Hon. Donald M. Mosley, District Judge
Law Offices of Gamage & Gamage
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk

⁴Alternatively, Madrid argues that the CD itself was not the bad act, but instead was evidence of various bad acts referenced in the lyrics. The district court concluded that the CD was not evidence of prior bad acts but helped establish motive and gang involvement. We conclude that the trial court did not abuse its discretion in denying the motion for new trial on this basis. See U.S. v. Stuckey, 253 Fed. Appx. 468, 482-83 (6th Cir. 2007) (holding that the district court did not abuse its discretion in determining that rap lyrics sung by a defendant were not evidence of a prior bad act) cert. denied, ___ U.S. ___, 128 S. Ct. 2979 (2008).