

IN THE SUPREME COURT OF THE STATE OF NEVADA

MOISES BARRAGAN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 53803

FILED

MAY 07 2010

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *[Signature]*
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of conspiracy to commit a crime, first-degree murder, attempted murder, and discharging a firearm out of a vehicle.¹ Eighth Judicial District Court, Clark County; Kathy A. Hardcastle, Judge. Appellant Moises Barragan raises four claims on appeal.

First, Barragan claims that the district court erred by holding an “insufficient” evidentiary hearing before admitting field interview cards at his trial. This claim is without merit. The district court admitted the evidence following a pretrial hearing during which the officers who conducted the interviews testified regarding each encounter. We conclude that the district court did not err in admitting the evidence because Barragan failed to show that he was in custody during the interviews or

¹Where relevant, the jury found that Barragan committed the charged crimes with the use of a deadly weapon and with the intent to promote, further, or assist a criminal gang. See NRS 193.165; NRS 193.168. Pursuant to NRS 193.169(1), Barragan was sentenced for only one enhancement per count.

that they were involuntary.² See Somee v. State, 124 Nev. 434, 444-45, 187 P.3d 152, 159-60 (2008) (“If the totality of the circumstances surrounding the field interview suggests that the encounter was consensual, all evidence obtained thereby should be admitted.”); Avery v. State, 122 Nev. 278, 286-87, 129 P.3d 664, 670 (2006) (noting that district court’s determination of custody and voluntariness is reviewed de novo).

Second, Barragan claims that the district court erred by admitting two recorded phone conversations at trial because they lacked sufficient indicia of reliability and were more prejudicial than probative. In one recording, Barragan stated that he had knowledge of a vehicle matching the description of the one used in the crime. In the other recording Barragan stated, “Never again am I going to kill somebody for things that (unintelligible) doing you know.” These statements were clearly admissible against Barragan as admissions of a party opponent. See NRS 51.035(3)(a). And in light of Barragan’s defense of misidentification, we conclude that the “probative value” of the recordings was not “substantially outweighed by the danger of unfair prejudice.” NRS 48.035(1). Therefore, we conclude that the district court did not abuse its discretion in admitting them. See Glover v. Dist. Ct., 125 Nev. ___, ___, 220 P.3d 684, 693 (2009).

Third, Barragan claims that the prosecutor committed misconduct during closing argument by (1) asserting that Barragan’s admission to killing someone referred to the victim in this case and (2) stating that reasonable doubt was “not mere possible doubt.” Because

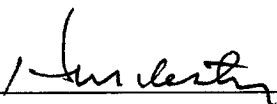
²We also reject Barragan’s claim that NRS 62H.010(4) prohibits officers from photographing a minor who is not in custody.

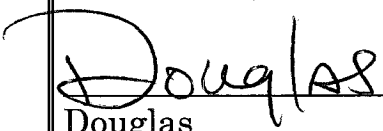
Barragan did not object to either of these statements, his claim is reviewed for plain error. See Higgs v. State, 126 Nev. ___, ___, 222 P.3d 648, 662 (2010). We conclude that the first statement was proper argument based on the evidence presented at trial. And the second statement was not an attempt to quantify reasonable doubt, see McCullough v. State, 99 Nev. 72, 75, 657 P.2d 1157, 1158-59 (1983), but a correct statement of Nevada law. See NRS 175.211. We discern no error.


Finally, Barragan claims that the district court erred by permitting the State to introduce evidence supporting both the deadly weapon and gang promotion enhancements at trial. He claims that because he can only be sentenced for one enhancement, see NRS 193.169(1), the evidence of his gang affiliation was superfluous and constituted prior bad act evidence admitted without a proper hearing. This claim is without merit. NRS 193.169(3) permits the State to present evidence of alternative enhancements. Moreover, in this context the evidence of gang affiliation was not character evidence but was relevant to prove the charged crime. See Somee, 124 Nev. at 446, 187 P.3d at 160-61.

Having considered Barragan's claims and concluded that they are without merit, we

ORDER the judgment of conviction AFFIRMED.


_____, J.
Hardesty


_____, J.
Douglas


_____, J.
Pickering

cc: Hon. Kathy A. Hardcastle, District Judge
Legal Resource Group
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk