IN THE SUPREME COURT OF THE STATE OF NEVADA

DAVID GARCIA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 62760

FILED

JAN 16 2014

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY D. Malone
DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of conspiracy to commit murder; attempted murder with the intent to promote, further, or assist a criminal gang; first-degree kidnapping with the intent to promote, further, or assist a criminal gang; and battery with the use of a deadly weapon resulting in substantial bodily harm with the intent to promote, further, or assist a criminal gang. Eighth Judicial District Court, Clark County; Stefany Miley, Judge. Appellant David Garcia raises six claims of error.

First, Garcia contends that there was insufficient evidence to support his conviction for first-degree kidnapping because any movement or restraint was incidental to the underlying offenses. *See Mendoza v. State*, 122 Nev. 267, 274, 130 P.3d 176, 180 (2006) (explaining that as a general matter "movement or restraint incidental to an underlying offense . . . will not expose the defendant to dual criminal liability under . . . the . . . kidnapping statutes"). The State alleged that Garcia kidnapped the victim for the purpose of committing attempted murder by punching and kicking him about the body and/or battery by stabbing him with a sharp object. We review the evidence in the light most favorable to the

prosecution and determine whether any rational juror could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia,* 443 U.S. 307, 319 (1979); *McNair v. State,* 108 Nev. 53, 56, 825 P.2d 571, 573 (1992).

Here, evidence was presented that the victim was seated on the couch between Garcia and another member of Garcia's gang, "Puppet." Puppet asked the victim if he wanted to be with Puppet's girlfriend and then struck him in the face. The victim fell or was dragged to the ground and felt someone kicking and punching him about the body repeatedly. The victim then felt himself being lifted up by his armpits and returned to the couch where one person held him down while a second person continued to punch him in his abdomen and chest. The victim heard Puppet say "F your family" and then stab him twice in a tattoo on his forearm with the names of his two children. The victim then pushed Puppet down and ran out of the apartment.

We conclude that a rational juror could not infer from these circumstances that the movement or restraint of the victim "serve[d] to substantially increase the risk of harm to the victim over and above that necessarily present in" attempted murder or battery, or "substantially exceed[ed] that required to complete" attempted murder or battery. *Mendoza,* 122 Nev. at 274, 130 P.3d at 180. We also conclude that a rational juror could not infer from these circumstances that the movement or restraint "stands alone with independent significance from the underlying charge[s]." *Id.* at 275, 130 P.3d at 181. Accordingly, we reverse the conviction for first-degree kidnapping.

Second, Garcia contends that the district court erred by overruling his objection and allowing the State's gang expert to offer his

opinion that the victim was beaten by Garcia "for the benefit or affiliation or to further promote or assist" his street gang because this opinion invaded the province of the jury and described Garcia's state of mind or mental processes at the time of the attack. NRS 50.295 permits opinion testimony that embraces an ultimate issue to be decided by the trier of fact so long as it is "otherwise admissible." Expert testimony that a defendant had the mental state constituting an element of the crime charged is not admissible. *See Estes v. State*, 122 Nev. 1123, 1136, 146 P.3d 1114, 1123 (2006); *Pineda v. State*, 120 Nev. 204, 214 n.30, 88 P.3d 827, 834 n.30 (2004); *Winiarz v. State*, 104 Nev. 43, 50-51 & n.6, 752 P.2d 761, 766 & n.6 (1988). The jury was instructed that it must determine (1) "whether the crime was committed *knowingly* for the benefit of, at the direction of, or in affiliation with, a criminal gang," and (2) "with the *specific intent* to promote, further, or assist the activities of a criminal gang" in order to convict Garcia of the gang enhancement. (Emphasis added.). In addition to the above testimony stating that Garcia had the requisite specific intent, the expert also opined that the altercation "was not alcohol-based or female-based, it is based on two rival gangs or perceived rivalries," Garcia thought the victim was a Norteño, "it directly benefits the Sureños to win that fight," and whatever it took for Garcia and Puppet "to win that fight, is what they were going to do." We conclude that the district court erred by allowing the gang expert to testify about Garcia's mental state at the time of the altercation. *See Pineda*, 120 Nev. at 214 n.30, 88 P.3d at 834 n.30 (explaining that the district court properly excluded gang expert's testimony amounting to comments on defendant's "mental processes; and testimony describing what, if any, effect the scenario described by the witnesses would have on [defendant's] actual

behavior"). In light of other testimony by Garcia's gang expert, Puppet's girlfriend, and the victim himself, which undermined the State's theory supporting the gang enhancement, we conclude that this error was not harmless. Therefore, we reverse the gang enhancements.

Third, Garcia contends that the district court erred by admitting evidence that was obtained in violation of his Fifth Amendment privilege against self-incrimination. Garcia argues that he was subject to custodial interrogation without *Miranda*[1] warnings when he told three different prison officials that he was a member of the Brown Pride Locotes street gang. We review the district court's decision to admit this testimony de novo. *See Rosky v. State*, 121 Nev. 184, 190, 111 P.3d 690, 694 (2005). "An interrogation for *Miranda* purposes 'refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.'" *Archanian v. State*, 122 Nev. 1019, 1038, 145 P.3d 1008, 1022 (2006) (quoting *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980)). Routine booking questions are normally attendant to arrest and custody and exempt from *Miranda*'s coverage. *See Pennsylvania v. Muniz*, 496 U.S. 582, 600-02 (1990) (plurality opinion). However, "the police may not ask questions, even during booking, that are designed to elicit incriminatory admissions." *Id.* at 602 n.14.

Only one of the three officials obtained Garcia's admission after a criminal complaint which included a gang enhancement was filed

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[1]*Miranda v. Arizona*, 384 U.S. 436 (1966).

in this case. It is unlikely that the two officials who obtained statements well before the complaint was filed designed or intended their questions to elicit incriminating admissions that could be used in a future prosecution. As for the third officer, Garcia does not argue that his question was anything other than a routine jail classification question designed to ensure that Garcia was not placed in the same jail cell as a rival gang member. *Cf. Nika v. State*, 113 Nev. 1424, 1438-39, 951 P.2d 1047, 1056-57 (1997) (concluding that question related to prisoner safety by the county jail's classification unit was not custodial interrogation), *overruled on other grounds by Leslie v. Warden*, 118 Nev. 773, 781, 59 P.3d 440, 446 (2002). Therefore, Garcia has not demonstrated that the district court erred by admitting the testimony.

Even if the district court erred by admitting this officer's testimony, pictures of Garcia's neck tattoo reading "Brown Pride Locotes," large tattoo across his belly reading "BPL's," large tattoo across his chest reading "Sureño," and other gang-related tattoos put the jury on notice that Garcia was indeed a gang member. Therefore, any error in admitting Garcia's statements about his gang affiliation was harmless.

Fourth, without citing any case law or statute, Garcia contends that the State introduced improper bad act evidence through the testimony of several prison officials about Garcia's prior incarceration and gang affiliation which could have led the jury to conclude that he was a "bad guy." Presumably, Garcia is arguing that the district court abused its discretion by admitting certain testimony because NRS 48.045(2) prohibits the introduction of "[e]vidence of other crimes, wrongs or acts . . . to prove the character of a person to show that the person acted in conformity therewith." The State contends that the testimony was

admissible to prove all of the elements of the gang enhancement statute. *See* NRS 48.045(2) (providing exceptions to the general rule). Even if the district court erred by admitting the testimony, it did not affect his substantial rights. *See Qualls v. State*, 114 Nev. 900, 903, 961 P.2d 765, 767 (1998) (reviewing the erroneous admission of evidence of other bad acts for harmless error). The jury had already learned that Garcia had been previously incarcerated when Garcia gave his attorney permission to tell the jury during voir dire that "you will learn during this trial that [Garcia] had been an inmate at the Nevada State Prison." All of the members of the venire who remained on the jury told the district court that they would still presume that Garcia was innocent even though they knew that he had been previously incarcerated. Therefore, we are convinced that the introduction of any bad acts did not affect the outcome of the trial and we conclude that he is not entitled to relief on this claim. *See id.*

Fifth, Garcia contends that the district court erred by denying his motion for a mistrial because a witness told the jury that Garcia is "currently incarcerated in the Clark County Detention Center." Although we agree that the introduction of this testimony was error, *see Haywood v. State*, 107 Nev. 285, 288, 809 P.2d 1272, 1273 (1991), Garcia failed to make a contemporaneous objection and we conclude that the comment was not "so prejudicial as to be unsusceptible to neutralizing by an admonition to the jury," *Allen v. State*, 99 Nev. 485, 490, 665 P.2d 238, 241 (1983). Therefore, the district court did not err by denying Garcia's motion.

Sixth, Garcia contends that the district court erred by denying his motion for a new trial based on newly discovered evidence because he located a witness who returned home after the attack and would have

testified that Garcia was sound asleep in the living room at some time between the hours of 2:00 a.m. and 4:00 a.m. "We have consistently held that the granting of a new trial in criminal cases on the ground of newly discovered evidence is largely discretionary with the trial court, and that court's determination will not be reversed on appeal unless abuse of discretion is clearly shown." *McCabe v. State*, 98 Nev. 604, 608, 655 P.2d 536, 538 (1982). Following a hearing on Garcia's motion, the district court found that he had failed to demonstrate any of the requirements for granting a new trial. *See Hennie v. State*, 114 Nev. 1285, 1289-90, 968 P.2d 761, 764 (1998). Because Garcia has failed to show that the district court clearly abused its discretion by denying the motion, Garcia is not entitled to relief on this claim.

For the reasons set forth herein, we

ORDER the judgment of conviction AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.

_____, J.
Hardesty

_____, J.
Douglas

_____, J.
Cherry

cc: Hon. Stefany Miley, District Judge
Sandra L. Stewart
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk