

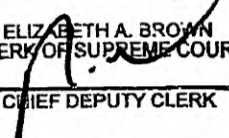
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

YAHIR BERNAL-RODRIGUEZ,  
 Appellant,  
 vs.  
 THE STATE OF NEVADA,  
 Respondent.

No. 86757-COA

FILED

JUN 20 2021

ELIZABETH A. BROWN  
 CLERK OF SUPREME COURT  
 BY  CHIEF DEPUTY CLERK

*ORDER OF AFFIRMANCE*

Yahir Bernal-Rodriguez appeals from a judgment of conviction pursuant to a jury verdict of murder with the use of a deadly weapon, attempted murder with the use of a deadly weapon, and discharging a firearm at or into a vehicle. Second Judicial District Court, Washoe County; Connie J. Steinheimer, Judge.

In March 2021, Bernal-Rodriguez, his older brother Fabian Bernal, Fabian’s girlfriend, and his younger brother, were inside a vehicle outside of the Town Liquor Store in Reno.<sup>1</sup> Fabian and his girlfriend entered the store, while the younger brother remained in the car. After Fabian and his girlfriend entered the store, another vehicle containing driver Adrian Rios and passenger Martin Montoya arrived in the store’s parking lot. Montoya exited the vehicle, wearing green, and entered the store where Fabian saw Montoya. There was no confrontation in the store, but after Fabian and his girlfriend returned to their vehicle, Montoya exited the store and allegedly “mad-dogged” them outside near their car. As established at trial, “mad-dogging” is a gesture that signals the individual is looking to fight the recipient of the gesture.

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<sup>1</sup>We recount the facts only as necessary for our disposition.

24-21457

Montoya then walked toward the vehicle he arrived in and entered it. Rios had apparently remained in the vehicle this entire time. After this interaction, Bernal-Rodriguez, a member of the South Side Locos gang, informed the other occupants of his vehicle that Montoya was wearing the colors of a rival gang, the Lost Minded Tokers or Little Mexican Krew. Shortly after this realization, Bernal-Rodriguez exited the vehicle with Fabian and ran toward Montoya and Rios. While not captured on security camera footage, fifteen shots were fired from two different handguns into Rios's vehicle shortly after Bernal-Rodriguez and Fabian disappeared from the camera's view. Security camera footage revealed Bernal-Rodriguez running towards their vehicle and driving away. The footage also showed Rios's vehicle slowly rolling backwards while Montoya fled the scene on foot. When the police arrived, they discovered Rios in the car, barely alive, with multiple gunshot wounds. Rios ultimately died from his injuries. Montoya was later treated for a gunshot wound.

Bernal-Rodriguez and Fabian were arrested and charged with murder with the use of a deadly weapon, attempted murder with the use of a deadly weapon, and discharging a firearm at or into a vehicle.<sup>2</sup> The brothers were tried together. Before trial, the State sought to produce evidence of Bernal-Rodriguez's gang affiliation and his gang's rivalry with the gang with which Montoya was affiliated. Bernal-Rodriguez opposed this motion. The district court granted the State's motion after a hearing in which it heard testimony from gang expert Reno Police Department

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<sup>2</sup>We note that the information implies the brothers were charged with open murder because it does not specify a degree of murder, but the jury verdict form reveals that they were found guilty of first-degree murder. The judgment of conviction does not specify the degree.

Detective Brenton Ball. The district court found that the evidence was relevant since it provided a possible motive and intent for the shooting; was proven by clear and convincing evidence; and was highly probative and not unfairly prejudicial. The court also ruled that it would give a limiting instruction, which it did in the charge to the jury. The court did not allow the State to present any evidence related to specific instances of violence between the two gangs.

During trial, Bernal-Rodriguez attempted to call Montoya as a witness. The State suspected that Montoya would invoke his Fifth Amendment right against self-incrimination during his testimony, so he was initially questioned by the State outside of the jury's presence. During questioning, Montoya answered some of the State's questions by admitting that he had sought medical treatment for a gunshot wound at some point in time—he did not remember if he sought treatment after the incident, further stated that he did not remember the events on the day of the incident, and he remained silent on the remaining questions after invoking his Fifth Amendment right. The court allowed defense counsel the opportunity to question Montoya, but they both declined. The court concluded that Bernal-Rodriguez could not call Montoya as a witness because Montoya would be forced to either incriminate himself or invoke the Fifth Amendment in front of the jury. Bernal-Rodriguez made no offer of proof as to the questions he planned to ask, nor did he argue that the few questions Montoya tentatively answered would be subject to impeachment. Because defense counsel would not have an opportunity to cross-examine Montoya at trial, the State did not present any evidence of Montoya's out-of-court statements to police.

At the close of trial, Bernal-Rodriguez was convicted of all charges and sentenced to life with the possibility of parole after 394 months.

He now appeals and argues that the district court abused its discretion by allowing the State to introduce evidence of his gang affiliation and erred by not allowing him to call Montoya as a witness because there were several questions Montoya would have answered, and he was prejudiced because he was unable to ask Montoya those questions. We disagree.

*The district court did not abuse its discretion by allowing the State to introduce evidence of Bernal-Rodriguez's gang affiliation*

Bernal-Rodriguez argues that the district court abused its discretion by allowing the State to introduce evidence of his gang affiliation because the incident was not clearly gang-related and the evidence was more prejudicial than probative. The State responds that the court's decision was in line with Nevada law and was not more prejudicial than probative because Bernal-Rodriguez identified one of the victims of a rival gang before the shooting.

We review a district court's decision to admit evidence of gang affiliation for an abuse of discretion. *Butler v. State*, 120 Nev. 879, 889, 102 P.3d 71, 78 (2004). A court abuses its discretion if its decision is arbitrary or capricious. *Crawford v. State*, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005). Before admitting evidence of gang affiliation, the court must determine whether "(1) the evidence is relevant, (2) it is proven by clear and convincing evidence, and (3) its probative value is not substantially outweighed by the danger of unfair prejudice." *Butler*, 120 Nev. at 889, 102 P.3d at 78. "[G]ang affiliation evidence may be relevant and probative when it is admitted to prove motive." *Id.* Additionally, evidence of other bad acts is admissible for "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." NRS 48.045(2).

Bernal-Rodriguez argues that his gang affiliation was not relevant because Rios and Montoya were members of rival gangs but were in

a car together (suggesting they were friends), so the shooting could not have been gang related. However, the district court found Bernal-Rodriguez's gang affiliation to be relevant as to motive and intent. Further, Bernal-Rodriguez's argument mischaracterizes the evidence from Detective Ball regarding gang rivalries. The issue is why did Bernal-Rodriguez act, not why Montoya was in the car with a gang member not from his own gang. And, according to his younger brother, Bernal-Rodriguez identified Montoya as a member of a rival gang immediately before the shooting. Finally, there was no evidence that Bernal-Rodriguez knew Rios's gang affiliation.

Accordingly, Bernal-Rodriguez's gang affiliation was relevant evidence for his motivation to shoot and intent when shooting into the vehicle that Montoya had entered. Additionally, while Bernal-Rodriguez fails to develop his argument that the evidence was more prejudicial than probative, the district court found that it was not unfairly prejudicial and took great care to limit the evidence heard by the jury. The court only allowed the jury to hear that Bernal-Rodriguez and Montoya were members of rival gangs and did not allow the jury to hear any examples of any acts of violence that the gangs had committed. And the court instructed the jury on the limited use of gang affiliation evidence. *See Tavares v. State*, 117 Nev. 725, 30 P.3d 1128 (2001).

Accordingly, we conclude that the district court properly found that the evidence to be presented to the jury was highly probative and its evidentiary value was not substantially outweighed by the danger of unfair prejudice. Specifically, the only evidence allowed before the jury was the gang identification and rivalry that provided motive and intent for the shooting. Further, any unfair prejudice was softened by the limiting instruction. We also note that the district court's order on the matter

included a thorough examination of both the facts and the law on this issue. Therefore, we conclude that the district court did not abuse its discretion.

*The district court did not violate the Confrontation Clause when it determined that Montoya invoked his Fifth Amendment right to remain silent and was not required to testify*

Bernal-Rodriguez argues that the district court erred by disallowing Montoya to testify because it violated his right to confront Montoya since Montoya indicated a willingness to answer some questions and, thus, he should have been allowed to ask some questions. The State responds that Bernal-Rodriguez improperly framed the argument on appeal, failed to present a cogent argument, and that Montoya properly invoked his Fifth Amendment right to silence.

This court generally reviews “a district court’s evidentiary rulings for an abuse of discretion,” but reviews whether a defendant’s Confrontation Clause rights were violated de novo. *Chavez v. State*, 125 Nev. 328, 339, 213 P.3d 476 (2009). The Confrontation Clause provides that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.” U.S. Const. amend. VI.

Montoya was not allowed to testify because he repeatedly invoked the Fifth Amendment during a hearing outside of the presence of the jury in response to many of the State’s questions. Montoya initially answered a couple questions but then backtracked and stated that he did not remember the events the State asked him about. Additionally, none of the statements Montoya made to the police after the incident were introduced at trial. Finally, neither defense counsel asked Montoya any follow-up questions when given the opportunity to do so outside the presence of the jury.

Bernal-Rodriguez fails to present a cogent argument on this issue. He has provided minimal argument and authority that the witness

should take the stand to answer some questions, that he does not articulate, and risk the invocation of the Fifth Amendment in front of the jury. Accordingly, we need not consider it. *See Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) (explaining that this court need not consider an appellant's argument that is not cogently argued or lacks the support of relevant authority). Further, Bernal-Rodriguez has failed to explain how the Confrontation Clause has been violated when no testimonial evidence from Montoya was presented to the jury. *See Crawford v. Washington*, 541 U.S. 36, 53-54 (2004) (explaining that the Confrontation Clause prohibits the admission of "testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination"). However, even if we consider the merits of Bernal-Rodriguez's argument he does not succeed.

Generally, a criminal defendant can compel a witness to testify on their behalf. *Palmer v. State*, 112 Nev. 763, 766, 920 P.2d 112, 113 (1996). However, a witness's valid assertion of their "Fifth Amendment rights justifies a refusal to testify despite the defendant's Sixth Amendment rights." *Id.* (quoting *United States v. Goodwin*, 625 F.2d 693, 700 (5th Cir. 1980)).

Bernal-Rodriguez does not argue that Montoya did not properly invoke his Fifth Amendment right against self-incrimination. Instead, Bernal-Rodriguez argues that since Montoya only asserted his right when answering some questions and not all questions, Montoya should have been allowed to ask the questions Montoya was willing to answer in front of the jury. The district court found that Montoya's Fifth Amendment right against self-incrimination would be violated if he was forced to testify by Bernal-Rodriguez and was asked questions designed to prove that Montoya had brandished and made threats with a weapon, and flashed gang signs at


Bernal-Rodriguez that led to the shooting. However, the district court did not specifically address Bernal-Rodriguez's ability to ask the few questions for which Montoya did not invoke the Fifth Amendment.


On appeal, Bernal-Rodriguez does not indicate what questions he would have asked Montoya if given the opportunity at trial. However, as noted above, Montoya testified outside the presence of the jury that he had sought medical treatment for a gunshot wound at some point in time but did not remember the events leading up to the shooting. Yet, even if Bernal-Rodriguez had been permitted to elicit such testimony at trial, we do not see how such testimony would have impacted the jury's verdict. Further, Bernal-Rodriguez does not argue that the equivocal answers Montoya gave, or retracted, could be impeached by prior inconsistent statements.


Accordingly, we conclude that if there was any error when the district court prevented Bernal-Rodriguez from calling Montoya as a witness, it was harmless beyond a reasonable doubt. *See Cortinas v. State*, 124 Nev. 1013, 1028, 195 P.3d 315, 325 (2008) (providing that a conviction should not be set aside if the reviewing court concludes that the error was harmless beyond a reasonable doubt).

Accordingly, we

ORDER the judgment of conviction AFFIRMED.<sup>3</sup>

  
\_\_\_\_\_, J.  
Bulla

  
\_\_\_\_\_, C.J.  
Gibbons

  
\_\_\_\_\_, J.  
Westbrook

<sup>3</sup>Insofar as Bernal-Rodriguez raised arguments that are not specifically addressed in this order, we have considered the same and conclude they do not present a basis for relief.



cc: Hon. Connie J. Steinheimer, District Judge  
Washoe County Alternate Public Defender  
Attorney General/Carson City  
Washoe County District Attorney  
Washoe District Court Clerk