IN THE SUPREME COURT OF THE STATE OF NEVADA

FABIAN BERNAL,
Appellant,
vs.
THE STATE OF NEVADA,
Respondents.

No. 86748

FILED

JAN 22 2025

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
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, 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 2021, appellant Fabian Bernal and the codefendant, Yahir Bernal-Rodriguez (Yahir), were involved in a shooting outside a liquor store. Adrian Rios died during the incident while another victim, Martin Montoya, survived. Bernal and Yahir were charged and tried together for killing Rios and related offenses. Bernal was convicted on all counts. Bernal appeals, contending that the district court erred in admitting gang-affiliation evidence against Yahir, denying Bernal's request to sever his trial from Yahir's trial, excluding testimony from a witness who invoked his right against self-incrimination, and admitting a photograph of Bernal with a firearm. We disagree and affirm the judgment of conviction.

The district court properly admitted gang-affiliation evidence

Bernal argues that the district court erred in admitting evidence of Yahir's gang affiliation because it was more prejudicial than probative. Before admitting gang-affiliation evidence, "the trial 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 v. State*, 120 Nev. 879, 889, 102 P.3d 71, 78 (2004). We review the decision to admit or exclude evidence for an abuse of discretion, and "this court will respect the trial court's determination as long as it is not manifestly wrong." *Colon v. State*, 113 Nev. 484, 491, 938 P.2d 714, 719 (1997).

Here, the district court first determined the gang-affiliation evidence was relevant to prove Yahir's motive and intent. *See Butler*, 120 Nev. at 889, 102 P.3d at 79 (concluding that defendant's "gang affiliation was essential to show his motive for murdering" the victims). Next, the district court concluded that the State proved, by clear and convincing evidence, that Yahir and one of the victims were affiliated with rival gangs. As to balancing of the probative value against the danger of unfair prejudice to Bernal, crucially, the gang-affiliation evidence was admitted against Yahir only. In fact, the district court admonished the jury at the time of the testimony that the evidence was only to be used to consider Yahir's motive and intent, and for no other purpose. Moreover, the district court provided two written jury instructions to the same effect before deliberations. *See Leonard v. State*, 117 Nev. 53, 66, 17 P.3d 397, 405 (2001) (recognizing that jurors are presumed to follow their instructions). Thus, we conclude the district court properly limited the jury's consideration of the gang-affiliation evidence and did not abuse its discretion in admitting the evidence against Yahir only.

The district court did not err in denying Bernal's motion for severance

Bernal contends that the spillover effect of the gang-affiliation evidence admitted against Yahir tainted his defense such that the district court should have severed his trial from Yahir's trial. A district court's

decision to grant or deny a motion for severance of codefendants' trials is reviewed for an abuse of discretion. *Marshall v. State*, 118 Nev. 642, 646-47, 56 P.3d 376, 379 (2002). "[M]isjoinder requires reversal only if it has a substantial and injurious effect on the verdict." *Id.* at 647, 56 P.3d at 379.

Here, Bernal's argument rests solely on the fact that gang-affiliation evidence was admitted against Yahir. In a joint trial, the spillover effect alone is insufficient to establish substantial prejudice. *See Lisle v. State*, 113 Nev. 679, 689-90, 941 P.2d 459, 466 (1997) (explaining that "[s]everance of defendants will not be granted if based on guilt by association alone") (internal quotation marks omitted), *overruled on other grounds by Middleton v. State*, 114 Nev. 1089, 1117 n.9, 968 P.2d 296, 315 n.9 (1998). Bernal has not demonstrated that the jury was unable to compartmentalize the evidence admitted against Yahir only. As noted above, the jury was properly instructed that the gang-affiliation evidence could not be used for any other purpose than considering Yahir's motive and intent. *See Tavares v. State*, 117 Nev. 725, 731-33, 30 P.3d 1128, 1132-33 (2001) (requiring a limiting instruction specifying the approved purpose of other-act evidence admitted against the defendant at the time the evidence is admitted and before deliberation), *modified in part by Mclellan v. State*, 124 Nev. 263, 182 P.3d 106 (2008). We presume that juries follow the instructions they are given. *Leonard*, 117 Nev. at 66, 17 P.3d at 405. Moreover, the jury heard testimony from a detective specializing in gang related crime that to his knowledge, Bernal was not associated with any gang. And the detailed limiting instructions regarding the gang-affiliation evidence adequately alleviated any potential prejudice. *See Lisle*, 113 Nev. at 690, 941 P.2d at 466. Thus, we conclude the district court did not abuse its discretion in denying Bernal's motion to sever.

The district court properly excluded testimony from the surviving victim

Bernal argues that the district court erred in precluding Montoya from testifying at trial after he invoked his Fifth Amendment right to remain silent during a pretrial hearing. Bernal contends that prohibiting Montoya from being called as a witness at trial violated Bernal's right to confront witnesses, that Montoya did not properly invoke and, even if the invocation was proper, it does not automatically prohibit a witness from being called to testify in a trial. We review constitutional challenges de novo. *Grey v. State*, 124 Nev. 110, 117, 178 P.3d 154, 159 (2008).

As to the Fifth Amendment, Bernal contends that the district court should not have prohibited Montoya from being called as a witness at trial because Montoya's invocation was either invalid or limited. We conclude that Montoya properly invoked his Fifth Amendment privilege when asked during the pretrial hearing whether he possessed a firearm at the time of the incident, whether he made any gestures to the defendants before the shooting, and whether he was associated with a gang. Answers to any of these questions could have implicated Montoya in criminal conduct. *See Hoffman v. United States*, 341 U.S. 479, 486-87 (1951) (explaining that to assert a Fifth Amendment privilege, the witness must have "reasonable cause" to fear criminal prosecution based on their testimony). Thus, Montoya had reasonable cause to fear answering the questions posed and he validly invoked his right to remain silent.

Furthermore, we disagree with Bernal's contention that the district court erred in not permitting Montoya to be called as a witness at trial in order to attempt to have him testify *around* the invocation. Setting aside the very real danger that Montoya would again answer some questions and then invoke his Fifth Amendment privilege in front of the jury, the proposed testimony Bernal sought would have had little to no

probative value in advancing Bernal's theory of defense. During the pretrial hearing, before invoking his right to remain silent, Montoya consistently denied remembering anything that happened on the night of the incident. Thus, his proposed testimony offered no support for Bernal's defense. Accordingly, we conclude the court did not err in disallowing Montoya to be called as a witness given his invocation and his valid basis for invoking his Fifth Amendment rights. *See Ducksworth v. State*, 113 Nev. 780, 790-91, 942 P.2d 157, 164 (1997) (stating that, if a witness indicates he will invoke his Fifth Amendment right on the witness stand, the district court may refuse to allow the defendant to call the witness where the defense is attempting "to persuade the jury to make negative inferences" about the witness).

Regarding Bernal's Confrontation Clause argument, the Sixth Amendment demands 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. Here, both the State and Bernal were prohibited from calling Montoya as a witness, so neither party was permitted to examine him. *See Delaware v. Van Arsdall*, 475 U.S. 673, 678-79 (1986) (explaining that the Confrontation Clause is not a blanket right to call any witness; its essential purpose is to secure the accused's right to cross-examine witnesses called by the prosecution). Additionally, Bernal does not assert that the State impermissibly introduced any of Montoya's prior statements against him. Thus, the Confrontation Clause is not implicated. Therefore, we conclude Bernal has not demonstrated that relief is warranted on this ground.

The district court erred in admitting a photograph of Bernal with a firearm, but the error was harmless

Bernal argues that the district court erred in admitting a photograph of Bernal in his bedroom sitting next to a firearm because the photograph was more prejudicial than probative. First, we note that Bernal failed to refer to the photographs by exhibit number, used an incorrect date, and did not properly recount which exhibits were admitted, all of which made review significantly more challenging. Reviewing for an abuse of discretion, *Mclellan*, 124 Nev. at 267, 182 P.3d at 109, we agree that the district court erred in admitting the single photograph of Bernal sitting on the bed next to the firearm, but we conclude that the error was harmless.

The photograph of Bernal in his bedroom with a firearm had minimal probative value because no firearms were recovered by law enforcement after the shooting. Additionally, another photograph of Bernal wearing the lanyard was admitted, further limiting the probative value of this particular photograph. However, the danger of unfair prejudice was apparent because the jury could be led to believe that Bernal was the shooter without any evidence linking the firearm in the photograph to the firearms used at the crime scene other than the general description that both the gun on the bed and the gun used in the crime were semi-automatic weapons. Given the minimal probative value, we conclude that it was error to admit the photograph. The error, however, was harmless.

A nonconstitutional error is harmless unless it had a substantial and injurious effect or influence on the jury's verdict. *Tavares*, 117 Nev. at 732, 30 P.3d at 1132; NRS 178.598. Here, the evidence supporting Bernal's convictions was overwhelming. *See Belcher v. State*, 136 Nev. 261, 283, 464 P.3d 1013, 1034 (2020) ("Where there is overwhelming evidence of guilt and the error's effect is insignificant by

comparison, an error is generally harmless beyond a reasonable doubt."). Thus, while we recognize the potential for unfair prejudice resulting from the erroneous admission of the photograph, we do not believe that it had such a significant influence over the jurors' ability to evaluate the other substantial evidence presented. Therefore, while it was error to admit the photograph, we conclude the error was harmless. Accordingly, we

ORDER the judgment of conviction AFFIRMED.

Lee, J.

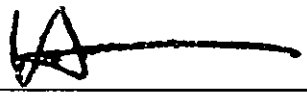
Bell, J.

HERNDON, J., concurring:

I concur in the result, but I write separately because I do not believe that the district court erred in admitting the photograph of Bernal with a firearm. Absent limited exceptions, "[a]ll relevant evidence is admissible." NRS 48.025(1). Relevant evidence is that which has "any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." NRS 48.015.

In this case, the State sought admission of two photographs that were computer screen shots of Bernal in his bedroom with a firearm on February 9th and 19th, 2021, approximately a month before the shooting. The photographs depicted Bernal with a semi-automatic firearm on his bed. The district court excluded one of the firearm photographs but admitted the

one dated February 19, 2021. As conceded by appellant on appeal, the district court relied in part on the fact that the admitted photograph also depicted Bernal with the lanyard to the car keys for the silver Nissan alleged to have been used in the shooting. That fact alone was highly probative of Bernal's connection to the car and therefore the shooting. Moreover, the photograph was relevant to prove that Bernal was in possession of a semi-automatic weapon close in time to the shooting. At the crime scene, shell casings indicated that one or more semi-automatic firearms were used. Evidence that Bernal had possession of such a firearm was therefore highly probative and relevant. And while the photograph may have prejudiced Bernal in some way, it did not do so in such a way as to make its admission erroneous. *See State v. Eighth Jud. Dist. Ct. (Armstrong)*, 127 Nev. 927, 933, 267 P.3d 777, 781 (2011) ("Because all evidence against a defendant will on some level 'prejudice' (*i.e.*, harm) the defense, NRS 48.035(1) focuses on 'unfair' prejudice."). On balance, the probative value of the photograph was not substantially outweighed by the danger of unfair prejudice. Accordingly, I would find that the district court did not abuse its discretion in admitting the photograph of Bernal with the lanyard and firearm.



_____, C.J.
Herndon

cc: Hon. Connie J. Steinheimer, District Judge
Oldenburg Law Office
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk