

Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEY FOR APPELLANT:

ATTORNEYS FOR APPELLEE:

GREGORY PAUL KAUFFMAN
South Bend, Indiana

STEVE CARTER
Attorney General of Indiana

JOSEPH ROBERT DELAMATER
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

HENRY GARCIA,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

)
)
)
)
)
)
)
)
)
)
)

No. 20A03-0712-CR-580

APPEAL FROM THE ELKHART CIRCUIT COURT
The Honorable Terry C. Shewmaker, Judge
Cause No. 20C01-0602-MR-1

April 22, 2008

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Defendant, Henry Garcia (Garcia), appeals his conviction for murder, a felony, Ind. Code § 35-42-1-1.

We affirm.

ISSUE

Garcia raises one issue, which we restate as: Whether the trial court abused its discretion when it admitted evidence of Garcia's prior bad acts during the trial.

FACTS AND PROCEDURAL HISTORY

On the evening of February 18, 2007, Garcia and others affiliated with his gang, the Norteños, went to an under twenty-one-year-old nightclub in Goshen, Indiana. At the club, Garcia and his companions got into a confrontation with a rival gang, the Sureños. Police officers broke up the confrontation. While doing so, one officer told Garcia to leave, to which Garcia responded, “[f]uck you nigger What are you going to do, shoot me?” (Transcript p. 99).

Garcia got into the driver's seat of a red Acura with Oscar Perez (Perez) sitting in the front passenger's seat, and other Norteños loaded into a Durango. The Sureños got into tan Malibu. As they were leaving the club parking lot, one of the Norteños in the Durango began yelling at the Sureños in the Malibu, and Garcia drove the Acura behind the Malibu to block it in its parking spot. The driver of the Malibu then jumped a curb to leave the parking lot with the Durango in pursuit, and the Acura following behind. As the automobiles traveled on U.S. 33, the Norteños in the Durango shot paint balls at the Malibu. The Malibu swerved,

came up behind the Durango, and rammed it from behind. Garcia brought the Acura closer to the Malibu, while traveling at high speeds. Perez grabbed an SKS assault rifle that he had stashed in the Acura, rolled down his window, and fired multiple shots at the Malibu. One of those shots killed a passenger in the Malibu, and another injured the driver.¹

On February 23, 2006, the State filed an Information charging Garcia with Count I, murder, a felony, I.C. § 35-42-1-1, and Count II, criminal gang activity, a Class D felony, I.C. § 35-45-9-3. On May 10, 2007, Garcia pled guilty to criminal gang activity and a judgment of conviction was entered. Sentencing was held in abeyance until after further proceedings on the charge of murder. Also, on May 10, 2007, Garcia filed a Request for 404(B) Notice, requesting the State to provide reasonable notice of any evidence of other crimes, wrongs, or acts that it intended to introduce at trial. On July 9, 2007, the trial court entered an Order determining, among other things, that the evidence of Garcia's prior wrongs or bad acts that the State intended to introduce as evidence was inextricably intertwined in the State's presentation of its motive evidence, thereby deeming the evidence admissible. From July 9, 2007, through July 13, 2007, a jury trial was held. The jury found Garcia guilty of murder. On August 9, 2007, the trial court imposed a fifty-five-year sentence for the murder conviction, and a one-and-one-half-year sentence for the criminal gang activity conviction to run concurrent to the sentence for murder, both to be served in the Indiana Department of Correction.

Garcia now appeals. Additional facts will be presented as necessary.

¹ We affirmed Perez's conviction for attempted murder recently in *Perez v. State*, 872 N.E.2d 208 (Ind. Ct.

DISCUSSION AND DECISION

Garcia argues that the trial court abused its discretion when it admitted evidence of Garcia's prior bad acts and general bad behavior during the jury trial. Specifically, Garcia alleges, "the [trial] court clearly abuse[d] its discretion when allowing the State to spend the better part of three days eliciting testimony about [the nightclub], Eric Perez' home, the fight at [] Perez' home, and the confrontation with police outside of [the nightclub]. None of these events goes to motive nor are they relevant to whether or not Garcia aided in [the victim's] murder. Simply put[,] they are used to allow the jury to draw the impermissible inference." (Appellant's Brief pp. 3-4). The State counters by arguing that Garcia has waived this issue on appeal, noting that Garcia failed to lodge an appropriate objection during the trial to preserve the issue for appeal. Additionally, the State adds that Garcia fails to allege that the admissions were fundamental error.

Garcia does not direct our attention to any specific testimony during trial which violated our rules of evidence, or to which his trial counsel objected during the trial. Instead, he cites to case law and presents a short general summary of what he alleges to be inadmissible testimony. It is well established that, "[f]ailure to object at trial to the admission of evidence results in waiver of that issue on appeal." *Kubsch v. State*, 784 N.E.2d 905, 923 (Ind. 2003). Garcia does make mention of his pre-trial Request for 404(B) Notice, and the trial court's Order in response deeming certain evidence of Garcia's prior bad acts and wrongs admissible. To the extent that Garcia may be relying upon this pre-trial motion to

App. 2007).

preserve the alleged error in admission of the State's evidence at trial, it is well-settled that in order to preserve error in the denial of a pre-trial motion, the appealing party must object to the admission of the evidence at the time it is offered. *Perez v. Bakel*, 862 N.E.2d 289, 295 (Ind. Ct. App. 2007). Therefore, we conclude that Garcia has waived any argument that the trial court abused its discretion when admitting the State's evidence.

CONCLUSION

For the foregoing reasons, we conclude that Garcia has waived any claim that the trial court abused its discretion when it admitted evidence of Garcia's prior bad acts.

Affirmed.

BAKER, C.J., and ROBB, J., concur.