

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:

ROBERT D. KING, JR.
The Law Office of Robert D. King, Jr., P.C.
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

JODI KATHRYN STEIN
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

JOSE RODRIGUEZ,)	
)	
Appellant-Defendant,)	
)	
vs.)	No. 49A05-1006-CR-410
)	
STATE OF INDIANA,)	
)	
Appellee-Plaintiff.)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Patricia J. Gifford, Senior Judge
Cause No. 49G02-0811-FA-264751

September 9, 2011

MEMORANDUM DECISION – NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Jose Rodriguez appeals his conviction for attempted murder and his sentencing enhancement for acting at the direction of or in affiliation with a gang. Rodriguez argues that there is insufficient evidence to sustain his conviction and sentencing enhancement. We find sufficient evidence to sustain both. In particular, we find sufficient evidence that Rodriguez was a gang member and that he committed the underlying offense at the direction of or in affiliation with the gang. We further conclude that the trial court did not err by admitting evidence of Rodriguez's gang membership in the guilt phase of trial, and we are not persuaded that Rodriguez's sentence is inappropriate in light of the nature of his offense or his character. We affirm his conviction and sentence.

Facts and Procedural History

The evidence most favorable to the verdict reveals that Rodriguez, his friend Mehn Mon Sorn, and Sorn's brother Chai were all members of a criminal gang known as the "West Side 13." The West Side 13 is a local chapter of the "Surenos" or "Sur 13" gang based in Southern California. To join the Sur 13, prospective members must commit a felony and/or sustain a battery from current members for an allotted period of time. The West Side 13 has a longstanding rivalry with another local Indianapolis gang known as "18th Street." Typical practice of the gangs is to commit violent crimes against one another.

One night Rodriguez, Sorn, and Chai attended a house party in Indianapolis. Both Rodriguez and Sorn were armed with .380 caliber handguns. Sorn brought an additional rifle which he stored underneath his car.

Also attending the party was Elesvan Cabrales-Cantreras and his friend Rogelio Rojas. Cabrales-Cantreras and Rojas were believed to be members of the rival 18th Street gang.

At some point Sorn became involved in a dispute with Rojas in the backyard. Soon they resorted to fisticuffs. Sorn revealed his pistol to Rojas. Rojas said he was going to retrieve his own gun, and he began running toward the front of the house.

Sorn informed Rodriguez that Rojas was getting a gun. Rodriguez responded, “Let’s go get them.” Sorn instructed Chai to retrieve the rifle from underneath his car. Rojas ran to the front of the house and called out for Cabrales-Cantreras. Cabrales-Cantreras was inside. He announced to his friends, “Let’s get out.” The partygoers made their way out the front door.

Rojas and several other people—also alleged to be 18th Street gang members— assembled in the middle of the street. The West Side 13 members remained in front of the house.

Police Officer David Moore was driving nearby to assist a traffic stop when he observed the hubbub. He saw two distinct lines of people forming in the street, as in a Civil War scene. Officer Moore made a u-turn to investigate.

Rodriguez began discharging his handgun. Chai fired into the crowd using the rifle. Sorn drew his own gun when Cabrales-Cantreras approached and punched him. Sorn fell to the ground. The two then started to wrestle over Sorn’s gun. Sorn called out to Rodriguez, “Get this dude.”

Rodriguez stood three to five feet away, aimed at Cabrales-Cantreras, and shot him in the back of the leg. Cabrales-Cantreras continued to fight with Sorn. Rodriguez started to run away but stopped and turned back. He shot Cabrales-Cantreras twice more. Then his gun jammed, so he took the rifle from Chai and shot Cabrales-Cantreras again. Rodriguez and Chai heard police sirens and fled.

Officer Moore approached on foot and observed Sorn and Cabrales-Cantreras still wrestling. Officer Moore identified himself and ordered them to stop. Sorn rolled away in the prone position. Cabrales-Cantreras shot four times in Moore's direction. Moore fired three shots back. Cabrales-Cantreras aimed at Moore again, at which time Moore discharged four more rounds. Cabrales-Cantreras fell over dead, having sustained a total of fourteen gunshot wounds. Moore inflicted seven of them.

The State charged Rodriguez with, among other things, the Class A felony attempted murder of Cabrales-Cantreras. The State also sought a sentencing enhancement for attempted murder, alleging that Rodriguez had acted at the direction of or in affiliation with a criminal gang.

The State filed notice of intent to offer evidence of Rodriguez's gang membership during the guilt phase of trial. The State sought to introduce the evidence as proof of motive. The trial court granted the State's request following a hearing and over the defense's motion to exclude. Evidence of Rodriguez's gang membership was introduced in the State's case-in-chief.

A jury found Rodriguez guilty as charged, and in a bifurcated sentencing proceeding, the jury found that Rodriguez was a criminal gang member and that he had acted at the direction of or in affiliation with the gang.

The trial court sentenced Rodriguez to twenty-five years for attempted murder plus an additional twenty-five years due to the gang-affiliation enhancement. Rodriguez appeals.

Discussion and Decision

Rodriguez raises three issues which we reorder and restate as: (I) whether the trial court erred by admitting evidence of Rodriguez's gang membership in the guilt phase of trial, (II) whether the evidence is sufficient to sustain Rodriguez's (A) attempted murder conviction and (B) gang affiliation sentencing enhancement, and (III) whether his fifty-year sentence is inappropriate in light of the nature of his offense and his character.

I. Admission of Gang Affiliation Evidence

Rodriguez argues that the trial court erred by admitting evidence of his gang affiliation in the first phase of trial. Rodriguez claims the evidence was irrelevant and unfairly prejudicial.

Indiana Evidence Rule 404(b) provides that “[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, intent, preparation, plan, knowledge, identity, or absence of mistake or accident” Evidence Rule 404(b) is designed to prevent the jury from assessing a defendant's present guilt on the basis of his propensities—the so-called “forbidden

inference.” *Hicks v. State*, 690 N.E.2d 215, 218-19 (Ind. 1997). While applied primarily in the context of “prior criminal acts,” the rule has been given a broad interpretation and has been held to apply to any conduct which may bear adversely on the jury’s judgment of the defendant’s character. *Kimble v. State*, 659 N.E.2d 182, 184 n.5 (Ind. Ct. App. 1996), *trans. denied*. Uncharged misconduct evidence may be admissible to prove motive, intent, or other material facts at issue in a case. *Embry v. State*, 923 N.E.2d 1, 9 (Ind. Ct. App. 2010), *trans. denied*. Rule 404(b)’s list of permissible purposes is illustrative but not exhaustive. *Id.*

In assessing the admissibility of 404(b) evidence, a trial court must (1) determine that the evidence of other crimes, wrongs, or acts is relevant to a matter at issue other than the defendant’s propensity to commit the charged act and (2) balance the probative value of the evidence against its prejudicial effect pursuant to Indiana Evidence Rule 403. *Wilson v. State*, 765 N.E.2d 1265, 1270 (Ind. 2002). Rule 403 provides that “[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury”

It is well-settled that evidence of motive is always relevant in the proof of an offense. *Tompkins v. State*, 669 N.E.2d 394, 397 (Ind. 1996). “Evidence of motive may be offered to prove that the act was committed, or to prove the identity of the actor, or to prove the requisite mental state.” 22 Charles Alan Wright & Kenneth W. Graham, Jr., *Federal Practice & Procedure* § 5240 (1978).

Furthermore, evidence of gang affiliation is routinely admitted as proof of motive to commit an alleged violent crime. *See, e.g., Williams v. State*, 690 N.E.2d 162, 173

(Ind. 1997) (“Membership in or involvement with the gang was [] highly probative of the motive for the shooting in the case.”); *Burgett v. State*, 758 N.E.2d 571, 579-80 (Ind. Ct. App. 2001) (“In the instant case, . . . Burgett’s gang and drug activity were intertwined with the alleged motive for the attempted murder of Daniels. Thus, . . . the evidence of Burgett’s prior bad acts was relevant, as it related to motive, which is always relevant in the proof of a crime.”), *trans. denied*; *Cadiz v. State*, 683 N.E.2d 597, 599-600 (Ind. Ct. App. 1997) (“Given that evidence of motive is relevant in the proof of a crime, and that evidence of participation in organizations such as racially biased groups is relevant in proving motive, we conclude evidence of Cadiz’ association with a gang member was relevant and admissible under Rule 404(b) to prove motive for the attack.” (citations omitted)); *see also* 1 Edward J. Imwinkelried, *Uncharged Misconduct Evidence* § 3:17 (2006) (“In homicide cases, and other violent crime prosecutions, the courts frequently admit uncharged misconduct to establish the defendant’s motive: The defendant was a gang member, and the victim was the member of a rival gang” (citations omitted)).

Here we conclude that evidence of Rodriguez’s gang affiliation was properly admitted as proof of his motive to commit attempted murder. Rodriguez’s membership in the West Side 13 suggested a solidarity with fellow gang member Sorn and an antipathy toward alleged rival gang member Cabrales-Cantreras. That solidarity and antipathy in turn revealed a motive for attempting to kill Cabrales-Cantreras. And we cannot say that the probative value of the gang-affiliation evidence was so substantially outweighed by any prejudicial effect as to require exclusion under Rule 403.

Accordingly, we find that the trial court did not err by admitting the evidence of Rodriguez's gang membership in the guilt phase of trial.

II. Sufficiency of Evidence

Rodriguez claims there is insufficient evidence to sustain his (A) attempted murder conviction and (B) gang-affiliation sentencing enhancement.

Our standard of review with regard to sufficiency claims is well-settled. In reviewing a sufficiency of the evidence claim, this Court does not reweigh the evidence or judge the credibility of the witnesses. *Bond v. State*, 925 N.E.2d 773, 781 (Ind. Ct. App. 2010), *reh'g denied, trans. denied*. We consider only the evidence most favorable to the verdict and the reasonable inferences drawn therefrom and will affirm if the evidence and those inferences constitute substantial evidence of probative value to support the verdict. *Id.* Reversal is appropriate only when reasonable persons would not be able to form inferences as to each material element of the offense. *Id.*

A. Attempted Murder

A person who knowingly or intentionally kills another human being commits murder, a felony. Ind. Code § 35-42-1-1. A person attempts to commit a crime when, acting with the culpability required for commission of the crime, he engages in conduct that constitutes a substantial step toward commission of the crime. *Id.* § 35-41-5-1. An attempt to commit murder is a Class A felony. *Id.*

The intent element for murder may be inferred from the use of a deadly weapon in a manner likely to cause death or serious bodily injury. *Johnson v. State*, 622 N.E.2d

172, 173 (Ind. 1993), *reh'g denied*. Firing a gun in the direction of the victim is sufficient to infer intent to kill. *Olive v. State*, 696 N.E.2d 381, 382 (Ind. 1998).

Here we find sufficient evidence to sustain Rodriguez's conviction for attempted murder. The record reveals that Rodriguez first shot Cabrales-Cantreras with a .380 handgun in the back of the leg. Rodriguez began to run away but returned and shot Cabrales-Cantreras twice more. And after his gun jammed, Rodriguez borrowed Sorn's rifle to shoot Cabrales-Cantreras yet again. All shots were fired at close range, approximately three to five feet away. And shortly beforehand, Rodriguez had told Sorn, "Let's go get them." A trier of fact could reasonably conclude from this evidence that Rodriguez committed a substantial step toward the commission of murder and did so with the requisite intent to kill the victim. Rodriguez maintains that "the evidence is insufficient to support the conclusion that he had specific intent to kill [Cabrales-Cantreras], only that he was trying to aid his best friend." Appellant's Br. p. 13. Rodriguez's contention amounts to no more than an invitation to reweigh the evidence, something which we may not do. We further note that Rodriguez did not tender, and the trial court accordingly did not provide, a jury instruction on self-defense or justification.

B. Gang-Affiliation Sentencing Enhancement

The State may seek to have a person who committed a felony offense sentenced to an additional fixed term of imprisonment, if the State can show beyond a reasonable doubt that the person knowingly or intentionally: (1) "was a member of a criminal gang while committing the offense" and (2) "committed the felony offense at the direction of or in affiliation with a criminal gang." Ind. Code § 35-50-2-15. A "criminal gang" is a

group with at least three members that (1) either: (A) promotes, sponsors, or assists in; or (B) participates in; or (2) requires as a condition of membership or continued membership; the commission of a felony or an act that would be a felony if committed by an adult or the offense of battery. *Id.* § 35-50-2-1.4.

The gang-affiliation sentencing enhancement is separate from Indiana's substantive offense of "participation in a criminal gang," Ind. Code § 35-45-9-3. Section 35-45-9-3 provides that "[a] person who knowingly or intentionally actively participates in a criminal gang commits criminal gang activity, a Class D felony." Indiana courts have held that to convict a defendant of criminal gang participation, the State must prove that the individual: (1) is an active member of a criminal gang, (2) has knowledge of the group's criminal advocacy, and (3) has a specific intent to further the group's goals. *Kilpatrick v. State*, 746 N.E.2d 52, 61 (Ind. 2001); *Ferrell v. State*, 746 N.E.2d 48, 51 (Ind. 2001); *Robles v. State*, 758 N.E.2d 581, 584 (Ind. Ct. App. 2001), *reh'g denied, trans. denied*; *Robinson v. State*, 730 N.E.2d 185, 195 (Ind. Ct. App. 2000), *trans. denied*; *Trice v. State*, 693 N.E.2d 649, 651 (Ind. Ct. App. 1998); *Helton v. State*, 624 N.E.2d 499, 510-11 (Ind. Ct. App. 1993), *trans. denied*. Otherwise stated, a conviction for criminal gang participation requires a "nexus" between the defendant's gang membership and his misconduct. *See Kilpatrick*, 746 N.E.2d at 62 (although defendant was a gang member, stabbing and attempted robbery of victim held insufficient to sustain conviction for gang participation; "[T]he State presented no evidence that Kilpatrick had the specific intent to further the gang's criminal goals when he stabbed and attempted to rob Crafter."); *Ferrell*, 746 N.E.2d at 51 (same); *Robles*, 758 N.E.2d at 584-85 (possession of

altered handgun and furnishing of alcohol to minor held insufficient; “While the State may have established that Robles was a member of a gang that commits criminal offenses and that he had knowledge of the gang’s criminal activity, it presented no evidence that he had the specific intent to further his gang’s criminal goals by committing the charged crimes.”); *Robinson*, 730 N.E.2d at 195 (shooting at police officers following drug bust insufficient, “[T]he State presented no substantive evidence of a nexus between [the defendant’s] alleged gang membership and the crimes for which he was charged and convicted.”); *Trice*, 693 N.E.2d at 651 (battery following argument held insufficient; “[T]he State presented no evidence that the battery was gang related.”). The imputed requirements of “specific intent” and “nexus” are “necessary to insure that the criminal gang activity statute does not interfere with one’s right to freedom of association and is not unconstitutionally vague or overbroad.” *Robles*, 730 N.E.2d at 584 n.5 (citing *Helton*, 624 N.E.2d at 511).

Rodriguez argues that the same showings required under the gang-participation statute must be made to sustain a gang-affiliation sentencing enhancement. That is, the State must prove that the defendant committed the predicate offense with a specific intent to further the gang’s criminal goals. The State responds that such a showing is unnecessary. The State argues that the gang-affiliation sentencing enhancement differs from the stand-alone offense in both form and function, and that there is “no need in this realm for the additional protection of specific intent to protect against prosecution by association alone.” Appellee’s Br. p. 13.

We need not resolve that question here, however, for even if we adopted Rodriguez's interpretation, we would still find a sufficient showing of "nexus" in this case to sustain Rodriguez's sentencing enhancement. Rodriguez, Sorn, and Chai were members of the West Side 13, a division of the national Sur 13 gang from California. Prospective Sur 13 members must commit a felony and/or endure a battery from current members in order to join. Meanwhile, Cabrales-Cantreras and Rojas were believed to be members of the rival 18th Street gang. The record further reveals that (a) Rodriguez, Sorn, and Chai came to the party together and were armed upon arrival, (b) Sorn became involved in a fight with Rojas, (c) Rodriguez told Sorn, "Let's go get them," (d) a Civil War-type standoff ensued, (e) Rodriguez and Chai began firing their guns into a crowd, (f) Sorn began wrestling with Cabrales-Cantreras, (g) Sorn called out to Rodriguez, "Get this dude," and (h) Sorn proceeded to shoot Cabrales-Cantreras repeatedly. A trier of fact could reasonably conclude from these circumstances that Rodriguez (1) was a member of a criminal gang when he committed the instant offense and (2) committed the offense at the direction of or in affiliation with the gang. And assuming without deciding that proof of "nexus" was required, a factfinder could also conclude that Rodriguez's offense was intended to further the goals of his criminal gang: Rodriguez's attempted murder of Cabrales-Cantreras was a violent crime directed specifically against an alleged rival gang member. In this respect Rodriguez's case is unlike *Kilpatrick*, *Ferrell*, *Robles*, *Robinson*, or *Trice*. Rodriguez maintains that the shooting was non-gang-related and that Cabrales-Cantreras was not even an 18th Street gang member. Again, Rodriguez's claims are no

more than requests to reweigh the evidence, something which this Court is not at liberty to do.

III. Inappropriateness of Sentence

Rodriguez finally argues that his aggregate fifty-year sentence is inappropriate in light of the nature of his offenses and his character.

Although a trial court may have acted within its lawful discretion in imposing a sentence, Article 7, Sections 4 and 6 of the Indiana Constitution authorize independent appellate review and revision of sentences through Indiana Appellate Rule 7(B), which provides that a court “may revise a sentence authorized by statute if, after due consideration of the trial court’s decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender.” *Reid v. State*, 876 N.E.2d 1114, 1116 (Ind. 2007) (citing *Anglemyer v. State*, 868 N.E.2d 482, 491 (Ind. 2007), *clarified on reh’g*, 875 N.E.2d 218 (Ind. 2007)). The defendant has the burden of persuading us that his or her sentence is inappropriate. *Id.* (citing *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006)). In assessing whether a sentence is inappropriate, appellate courts may take into account whether a portion of the sentence is ordered suspended or is otherwise crafted using any of the variety of sentencing tools available to the trial judge. *Davidson v. State*, 926 N.E.2d 1023, 1025 (Ind. 2010).

The sentencing range for a Class A felony is twenty to fifty years, with thirty years being the advisory term. Ind. Code § 35-50-2-4. Where a defendant is sentenced for a single felony and is found guilty under the gang-affiliation sentencing enhancement, the

court shall sentence the person to an additional fixed term of imprisonment equal to the sentence imposed for the underlying felony. *Id.* § 35-50-2-15(d)(1).

As for the nature of the offense, Rodriguez argues that it was neither calculated nor premeditated and stemmed only from his desire to protect a friend. The evidence and jury verdict suggest the contrary. Rodriguez and his cohorts came to the party armed with .380 caliber handguns and a rifle. Following a dispute between Sorn and Rojas, Rodriguez told Sorn, “Let’s go get them.” Rodriguez discharged his gun into the street crowd and fired no less than four shots at Cabrales-Cantreras. In addition, the episode landed a peace officer in the line of fire and resulted ultimately in the victim’s death. For these reasons we cannot say the nature of the offense merits a downward sentence revision.

As for the character of the offender, Rodriguez stresses his youth and lack of criminal history. Rodriguez was seventeen at the time of the instant offenses and has no formal criminal record. On the other hand, his pre-sentence report indicates that he is in the United States illegally and that he was arrested four times as a juvenile. He also freely admitted to his gang membership at trial. In any event, even if we resolved the proposed factors in Rodriguez’s favor, we cannot say they compel a departure from the sentence imposed.

For the reasons stated, we are not persuaded that Rodriguez’s fifty-year term is inappropriate.

Affirmed.

KIRSCH, J., and MATHIAS, J., concur.