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6 **IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO**

7 **STATE OF NEW MEXICO,**

8 Plaintiff-Appellee,

9 v.

**NO. 30,981**

10 **KEVIN JIM,**

11 Defendant-Appellant.

12 **APPEAL FROM THE DISTRICT COURT OF MCKINLEY COUNTY**

13 **Grant Foutz, District Judge**

14 Gary K. King, Attorney General

15 Santa Fe, NM

16 for Appellee

17 Liane E. Kerr

18 Albuquerque, NM

19 for Appellant

20 **MEMORANDUM OPINION**

21 **VIGIL, Judge.**

22 Defendant appeals from the district court's judgment and sentence, convicting

23 him for second degree murder by aiding and abetting. The jury acquitted Defendant

24 for the charges of first degree murder, aggravated assault with a deadly weapon, and

1 conspiracy to commit first degree murder, in this allegedly gang-related homicide by  
2 stabbing. Unpersuaded that Defendant demonstrated error in the admission of  
3 statements he made to police and evidence of his gang affiliation, we issued a notice  
4 of proposed summary disposition, proposing to affirm. Defendant has responded to  
5 our notice with a memorandum in opposition. We have considered Defendant's  
6 response and remain unpersuaded that the statements and evidence were erroneously  
7 admitted. Therefore, we affirm.

8         Defendant argues that the district court erred by admitting a portion of his  
9 recorded statement made to police and some of the officer's statements during his  
10 custodial interrogation under the hearsay exception for statements against interest  
11 found in Rule 11-804(B)(3) NMRA. [DS 3-4; MIO 2-3] Defendant argues that the  
12 recorded statements were not statements against interest and that most of the  
13 statements admitted were those of the police officers trying to coax admissions from  
14 Defendant. [MIO 3-4, 6-11] He also contends that the State did not prove that the  
15 prior stabbing incident was connected to the current case or that the stabbing in the  
16 current case was related to gang activity in any way. [DS 3-5; MIO 4-5, 10-11] Thus,  
17 Defendant argues that the statements do not qualify as admissible statements against  
18 interest and that the prejudicial effect of the statements far outweigh their probative

1 value because evidence of his gang affiliation under the circumstances constitutes  
2 improper propensity evidence. [Id.; MIO 11-17]

3 We review the district court's admission of the hearsay as a statement against  
4 interest for an abuse of discretion. *See State v. Torres*, 1998-NMSC-052, ¶ 15, 126  
5 N.M. 477, 971 P.2d 1267.

6 Defendant's arguments seem to presume that a statement against interest must  
7 rise to the level of a confession to fall under the hearsay exception or to even be  
8 relevant. [MIO 9-10] This is not the case. The Rules of Evidence permit admission  
9 of

10 A statement which was at the time of its making so far contrary to the  
11 declarant's pecuniary or proprietary interest, or so far tended to subject  
12 the declarant to civil or criminal liability, or to render invalid a claim by  
13 the declarant against another that a reasonable person in the declarant's  
14 position would not have made the statement unless believing it to be  
15 true.

16 Rule 11-804(B)(3). "[T]he analysis regarding statements against penal interests  
17 involves a fact-intensive inquiry that can only be answered in light of all the  
18 surrounding circumstances." *Torres*, 1998-NMSC-052, ¶ 15 (internal quotation marks  
19 and citation omitted). In order to determine whether a statement was made against the  
20 declarant's own penal interest, we view the statement in context. *See id.* ¶ 14. Thus,  
21 a facially neutral statement may be admissible under this hearsay exception where

1 under the circumstances it implicates the declarant, even if it inculcates another as  
2 well. *See id.* ¶¶ 16-19.

3 In the current case, Defendant's statements that were provided in the  
4 memorandum in opposition, when read in response to the officer's questions, made  
5 several admissions. [MIO 6-8] Defendant's statements conceded his membership in  
6 a gang, placed Defendant at the scene of the crime, acknowledged that he was out  
7 looking for three rival gang members because of a gang-related incident that occurred  
8 two months before the current stabbing, and acknowledged that Defendant was  
9 stabbed by a rival gang member in the two-month-old incident. [DS 4; MIO 6-8] In  
10 the factual context set forth in our notice, these statements clearly were made against  
11 Defendant's interests at the time they were given.

12 Also, for the many reasons stated in our notice, we are not persuaded by  
13 Defendant's assertion that there was no evidence the killing was gang-related.

14 As a result, we hold that Defendant's statements constituted statements against  
15 interests and were relevant to explain the motive behind the killing, however senseless  
16 and misdirected that motive and killing may have been.

17 Lastly, we are not persuaded by Defendant's arguments that the admission of  
18 evidence of Defendant's gang affiliation was more prejudicial than probative and  
19 constituted impermissible propensity evidence under our case law. In contrast to the

1 current case, in *State v. Torrez*, 2009-NMSC-029, ¶ 28, 146 N.M. 331, 210 P.3d 228,  
2 our Supreme Court reversed the defendant’s conviction and ordered a retrial where the  
3 expert testimony on gang culture was not supported by any evidence that the shooting  
4 was “related to gang rituals, rivalries, procedures, or other aspects of gang culture”  
5 and there was no evidence that the “[d]efendant was in fact a gang member at the time  
6 of the shooting.” As we have indicated above and in our notice, the evidence of  
7 Defendant’s gang affiliation was not introduced to show propensity for crime or to  
8 negatively influence the jury. Rather, Defendant’s gang affiliation was relevant to  
9 explain the motive behind the stabbing. We see no abuse of discretion in the district  
10 court’s admission of the statements and evidence of gang affiliation.

11 For the reasons stated in this opinion and in our notice, we affirm the district  
12 court’s judgment and sentence.

13 **IT IS SO ORDERED.**

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**MICHAEL E. VIGIL, Judge**

16 **WE CONCUR:**

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**JAMES J. WECHSLER, Judge**

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2 **LINDA M. VANZI, Judge**