

Circuit Court for Montgomery County
Case No: 134257C

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 3178

September Term, 2018

FELIZ SILVA ZUNIGA

v.

STATE OF MARYLAND

Graeff,
Arthur,
Moylan, Charles E., Jr.
(Senior Judge, Specially Assigned),

JJ.

PER CURIAM

Filed: February 4, 2020

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Feliz Silva Zuniga, appellant, was convicted of committing a third-degree sexual offense, sexual solicitation of a minor, and prostitution following a jury trial in the Circuit Court for Montgomery County. On appeal, Mr. Zuniga contends that the State made improper and prejudicial statements during its opening statement which, taken together, created “the highly incendiary inference that this was a gang related crime.” He argues, therefore, that the trial court abused its discretion in denying his motion for mistrial prompted by these statements. For the following reasons, we disagree and shall affirm.

“An appellate court will not reverse a denial of a mistrial motion absent clear abuse of discretion.” *Winston v. State*, 235 Md. App. 540, 570 (2018). In reviewing a trial court’s exercise of discretion, we consider whether it was “manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.” *State v. Baker*, 453 Md. 32, 46 (2017) (internal citation and quotations omitted).

Prior to the commencement of trial, Mr. Zuniga moved in limine to preclude any mention of gang involvement at trial, arguing that there was “no allegation that [Mr. Zuniga] was in the gang” and that “any mention of gang stuff” was “incredibly prejudicial to [Mr. Zuniga].” Granting the motion, the trial court specifically precluded from evidence “any mention of gangs, MS-13, or anything of that nature.” Although the State did not explicitly reference the terms “gang” or “MS-13” in its opening statement, Mr. Zuniga claims that it described, by inference, the victim’s “involvement in the gang.” In particular, Mr. Zuniga takes issue with the following statements made in the State’s opening:

[The victim will] tell you that in the summer of 2017 when she was 14, she had a middle school friend. She was in middle school at that time, a friend

named Edwin...introduced her to some guys that he hung out with. Some of these guys were older than her, some of them were close to her age.

She'll tell you that one of the older guys was a guy named Sombra (phonetic sp.) and that Sombra was involved with the owner of a restaurant called Lilly's. She'll tell you that she then briefly got a job at Lilly's sometime late in the summer, July or early August, of working at Lilly's as a waitress.

She'll tell you that Sombra, being older, being a member of this group and also being involved with the owner, was someone who was an authority figure to her. In fact, she'll tell you more than that. She'll tell you that if Sombra told her to do something, she did it, and she'll tell you that she was afraid when Sombra told her – she was afraid not to do something if he told her to do it.

She's also going to tell you that she doesn't really know [Mr. Zuniga] or didn't really know [Mr. Zuniga] but that he was someone who would come to Lilly's when she was waitressing, so she knew him in passing from the restaurant, but he was not someone that she knew until about the night of August 20th, 2017.

Now on August 20th, she'll tell you that she was at Lilly's that they went to another club nearby called Umberto's and that they were dancing, that there were a bunch of these guys that she was hanging out with there, and that at some point, Sombra came up to her and said hey –

The State further argued that the evidence would show that Mr. Zuniga “paid Sombra \$100” and that Sombra told the victim that she “needed to have sex with [Mr. Zuniga].”

Despite Mr. Zuniga's characterization of the foregoing statements, the record does not disclose an abuse of discretion by the trial court. Firstly, we recognize that, “the trial court is peculiarly in a superior position to judge the effect of any of the alleged improper remarks.” *Simmons v. State*, 436 Md. 202, 212 (internal citation omitted). “The judge is physically on the scene, able to observe matters not usually reflected in a cold record. The

judge is able ... to note the reaction of the jurors and counsel to inadmissible matters.” *Id.* (internal citation omitted). The trial court, therefore, was in a position superior than our own in determining the necessity of a mistrial when considering “whether the prejudice to the defendant was so substantial that he [or she] was deprived of a fair trial.” *Kosh v. State*, 382 Md. 218, 226 (2004) (internal citation omitted).

Secondly, it was not manifestly unreasonable for the trial court to conclude that the State had not suggested gang involvement in its opening statement. The State did not explicitly use the terms “gang” or “MS-13” therein, nor did its statement lead necessarily to the inference that the case was gang-related. Edwin was described as only a “friend” of the victim who “introduced her to some guys that he hung out with,” including Sombra. There was no suggestion that this group “individually or collectively engaged in a pattern or criminal gang activity” or that they had “as one of their primary objectives or activities the commission of one or more crimes,” both requirements for a group to be deemed a “criminal gang” under § 9-801 of the Criminal Law Article. Additionally, there was no suggestion that this group had “an overt organizational or command structure.” *Id.* While the victim’s fear and willingness to “do something” when “told” by Sombra does indicate an authority-type relationship, there are other reasonable inferences that may be drawn from this relationship other than a gang-related hierarchy. For example, because Sombra was “involved with the owner” of the restaurant in which she worked, the victim’s view of Sombra as an authority may have stemmed from an employment related hierarchy.

Further, it was reasonable for the court to conclude that the opening statement did not specifically prejudice Mr. Zuniga. Even were it to infer some type of gang

involvement, Mr. Zuniga concedes in argument that the State only “proceeded to describe [the victim’s] involvement in the gang.” Accordingly, it would have been reasonable for the court to conclude that the statements did not prejudice Mr. Zuniga as they spoke only to the victim’s “gang involvement.”

Lastly, the State was permitted in its opening statement to “inform the trier of facts of the issues involved [in the case] and what evidence [would] be offered as proof to resolve those issues.” *Ford v. State*, 235 Md. App. 175, 195 (2017). Charged with sexual solicitation of a minor and prostitution, we agree that it was appropriate for the State to argue “how and why [the victim] came to be provided to Mr. Zuniga” and that its statements furthered that purpose.

**JUDGMENT OF THE CIRCUIT
COURT FOR MONTGOMERY
COUNTY AFFIRMED. COSTS TO
BE PAID BY APPELLANT.**