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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1220**

State of Minnesota,
Respondent,

vs.

Gerardo Valdez,
Appellant.

**Filed May 21, 2012
Affirmed
Bjorkman, Judge**

Stearns County District Court
File No. 73-CR-10-6238

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Janelle P. Kendall, Stearns County Attorney, Carl Ole Tvedten, Assistant County Attorney, St. Cloud, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Jessica Merz Godes, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Bjorkman, Presiding Judge; Larkin, Judge; and
Lansing, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

BJORKMAN, Judge

Appellant challenges his conviction of first-degree sale of a controlled substance, arguing that the district court abused its discretion by denying his motion for a mistrial based on a witness's improper reference to gangs. We affirm.

FACTS

In April 2009, T.M. was working as a confidential informant for the St. Cloud Police Department. T.M. told Investigator Lucas Dingmann that she was familiar with appellant Gerardo Valdez and believed she could purchase cocaine from him.

Investigator Dingmann coordinated three controlled buys on April 3, 13, and 22. Each time, T.M. contacted Valdez to set up the buy and police recorded the phone conversation. Police then searched T.M., equipped her with an audio-recording device, and supplied her with money. T.M. met with Valdez at the agreed-upon location, and they conducted the exchange in Valdez's vehicle while police monitored them through visual and audio surveillance. T.M. purchased one eight-ball of cocaine from Valdez each time.¹ She then met up with police, was searched again, returned the recording device and any extra buy money, and turned over the cocaine.

Valdez was charged with three counts of second-degree sale of a controlled substance and one count of first-degree sale of a controlled substance. The first witness at trial was Investigator Dingmann. While describing the first controlled buy,

¹ Investigator Dingmann testified that the term eight-ball refers to one-eighth of an ounce, or approximately 3.5 grams.

Investigator Dingmann testified that he contacted Investigator Dan Miller because he is “a Sartell police officer and currently assigned to the Central Minnesota Gang and Drug Unit.” The prosecutor interposed an objection to halt the testimony. Valdez moved for a mistrial, arguing that the prosecutor should have better prepared the witness and that the gang reference was prejudicial, particularly in light of the potential admission of two photographs depicting Valdez’s spider-web tattoos.² In denying the motion, the district court reasoned that the “single reference to the gang and drug task force” was “not highlighted” and did not raise “any concerns about the jury taking that single word and using that somehow to decide this case based on some prejudicial attitude toward gangs as opposed to deciding it based on the evidence.” The district court offered to give a curative instruction.

After consulting with his lawyer, Valdez requested the instruction, which the district court gave the next morning:

Yesterday Officer Dingmann referred to his contact with Officer Dan Miller of the Sartell Police Department and mentioned that Officer Miller was affiliated with the Central Minnesota Gang and Drug Task Force. You must disregard the name of that organization and should not infer from Officer Miller’s involvement in this case that this case has anything at all to do with gang activity. There is no evidence, or claim by the State in this case, that the charges against Mr. Valdez have anything to do with gang activity. And Officer Dingmann’s reference to the name of the task force that Officer Miller was associated with should not be viewed by you jurors as any indication of gang involvement in this

² The state sought to admit two photographs depicting the tattoos because a police officer monitoring the first controlled buy was only able to identify Valdez by the tattoos. Valdez moved to exclude the photographs. The district court reserved its ruling until after T.M.’s testimony but ultimately admitted them.

matter. In fact, there is no such claim or evidence in this case about that and you must disregard any suggestion or inference of gang involvement.

The state then presented testimony from six additional police officers, two scientific experts, and T.M.

The jury found Valdez guilty on all counts, and the district court sentenced him to 111 months' imprisonment for the first-degree offense. This appeal follows.

DECISION

A mistrial should be granted only if there is a reasonable probability that the outcome of the trial would have been different had the incident resulting in the motion not occurred. *State v. Manthey*, 711 N.W.2d 498, 506 (Minn. 2006). We review the denial of a motion for a mistrial for abuse of discretion. *State v. Jorgensen*, 660 N.W.2d 127, 133 (Minn. 2003). And we consider the entirety of the trial, including the mitigating effects of a curative instruction, when determining whether inadmissible evidence affected the outcome of the trial. *See Manthey*, 711 N.W.2d at 506-07.

Valdez argues that the district court abused its discretion by denying his mistrial motion because Investigator Dingmann's testimony implied that Valdez was involved in gang activity, which prejudiced the jury against him. We disagree. Evidence of a defendant's involvement in a gang may be unfairly prejudicial. *State v. Jackson*, 726 N.W.2d 454, 463 (Minn. 2007) (stating that "gratuitous testimony about a defendant's gang membership or bad character may be unduly prejudicial"). But nothing in Investigator Dingmann's testimony reasonably implied that Valdez was involved in gang activity.

Investigator Dingmann explained that he worked for the drug unit of the St. Cloud Police Department, that T.M. mentioned Valdez to him, and that he was not initially familiar with Valdez. The prosecutor asked Investigator Dingmann “what information was known” about Valdez before the first controlled buy, and Investigator Dingmann described Valdez’s vehicle, gave a brief physical description of Valdez, and stated “that he possibly lived in the Evergreen trailer park in Sartell.” The prosecutor then asked whether Investigator Dingmann made contact with Investigator Miller, and why, which is when Investigator Dingmann indicated that Investigator Miller was “a Sartell police officer and currently assigned to the Central Minnesota Gang and Drug Unit.”³

After the off-the-record bench conference regarding Valdez’s mistrial motion, the prosecutor further inquired about Investigator Dingmann’s reason for involving Investigator Miller in the case. Investigator Dingmann explained that Investigator Miller worked for the drug unit and that he contacted Investigator Miller primarily because he worked for the Sartell Police Department, and Valdez was believed to reside in the Sartell area. Investigator Miller confirmed that Investigator Dingmann contacted him to check Valdez’s Sartell address and look for Valdez’s vehicle. He observed a vehicle matching the description of Valdez’s vehicle leaving the residence around the time of the first controlled buy and communicated this information to Investigator Dingmann. Overall,

³ Valdez also asserts that the reference to gangs was the result of the prosecutor failing to appropriately instruct the state’s witnesses to avoid such references. The record indicates otherwise. The prosecutor explained that he “did have a conversation with Investigator Dingmann. We talked about that I would lead him through the reference to drug unit.” The prosecutor’s objection to Investigator Dingmann’s testimony and the absence of any other references to gangs in front of the jury is consistent with this assertion.

this testimony demonstrates that Investigator Miller became involved in this case because he worked in and was familiar with the city in which Valdez lived, not because he or Investigator Dingmann suspected Valdez of gang activity. *See Jackson*, 726 N.W.2d at 463 (stating that concerns about “gratuitous testimony about a defendant’s gang membership or bad character” were not implicated because “there was no actual mention of gang membership”).

Moreover, the district court’s curative instruction ruled out any possible link between Valdez and gang activity. *See Manthey*, 711 N.W.2d at 506 (observing that a curative instruction may “blunt[] the impact” of improper testimony, making mistrial unnecessary). The district court expressly instructed the jury to disregard Investigator Dingmann’s reference to the gang and drug unit. But it did more than that, stating flatly that there was no evidence of gang involvement.

We generally presume that a jury follows the district court’s instructions. *State v. Miller*, 573 N.W.2d 661, 675 (Minn. 1998). Valdez complains that the instruction “did much more harm than good” because it restated the objectionable testimony and repeatedly referenced gangs. *See Manthey*, 711 N.W.2d at 506 (stating that curative instructions that are too “specific” can actually “draw[] attention” to the improper testimony). We disagree. Valdez requested a curative instruction. Because he made the request the following morning, it would have been impossible for the district court to give the instruction without referencing Investigator Dingmann’s testimony and using the word gang. What Valdez characterizes as repeated references to gangs are the district

court's clear instruction that the case has nothing to do with gangs. This instruction substantially mitigated any potential prejudicial effect of the objected-to testimony.

Finally, the overwhelming evidence against Valdez leaves no reasonable possibility that Investigator Dingmann's single reference to gangs had any effect on the verdict. The jury heard consistent testimony from numerous police officers and T.M. regarding the series of controlled buys. The jury heard the telephone calls and audio recordings of other exchanges between T.M. and Valdez. It viewed surveillance photographs illustrating some of Valdez's conduct. And the jury heard significant evidence identifying the substance obtained from Valdez as cocaine and establishing the quantity of cocaine purchased each time. On this record, we conclude that the district court did not abuse its discretion by denying a mistrial because of Investigator Dingmann's single, non-specific reference to gangs.

Affirmed.