

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KYLE M. BILLINGTON,

Defendant-Appellant.

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UNPUBLISHED

April 25, 2000

No. 210612

Midland Circuit Court

LC No. 97-008568-FH

Before: Whitbeck, P.J., and Hoekstra and Owens, JJ.

PER CURIAM.

Defendant appeals as of right jury convictions of three counts of delivery of marijuana, one count of possession with intent to deliver marijuana and one count of conspiracy to deliver marijuana, in violation of MCL 333.7401(2)(d)(iii); MSA 14.15(7401)(2)(d)(iii) and MCL 750.157a; MSA 28.354(1). The trial court sentenced defendant as a fourth habitual offender, MCL 769.12; MSA 28.1084, to a term of thirty months' to fifteen years' imprisonment on each conviction, to be served concurrently. We affirm defendant's convictions, but vacate his sentence under the habitual offender statute and remand for resentencing on the underlying convictions alone.

Defendant first argues that he was denied his constitutional rights to due process and to appeal his convictions because an audio tape that was admitted at trial was destroyed after he filed his appeal. We disagree.

While MCR 7.210(C) requires parties possessing exhibits offered in evidence at trial to file them with the trial court upon a claim of appeal and the failure to observe this mandate is a serious omission, "not every gap in a record on appeal requires reversal of a conviction." *People v Wilson (On Rehearing)*, 96 Mich App 792, 796, 797; 293 NW2d 710 (1980). If, through no fault of defendant, the record is inadequate for meaningful appellate review, we may vacate a conviction. *People v Adkins*, 436 Mich 878, 878; 461 NW2d 366 (1990); *People v Austin*, 76 Mich App 455, 458; 257 NW2d 120 (1977). However, loss of evidence does not mandate that result. If there is no prejudice to defendant from the loss of the exhibits, and his enjoyment of his constitutional right of appeal has not been impeded, we may undertake a meaningful review. *People v Drake*, 64 Mich App 671, 677-680; 236 NW2d 537 (1975). "Whether a record is sufficient in a particular case will of

course depend upon the questions that must be asked of it.” *Wilson, supra* at 797; see also *People v Audison*, 126 Mich App 829, 835; 338 NW2d 235 (1983).

Defendant claims that the tape, which was lost after the trial, should not have been admitted into evidence at trial because it was not sufficiently audible. We review a trial court’s decision to admit evidence for abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). An otherwise admissible tape will not be excluded “[u]nless the unintelligible portions are so substantial as to render the recording as a whole untrustworthy.” *People v Karalla*, 35 Mich App 541, 545-546; 192 NW2d 676 (1971) (citation omitted).

Although the record does not contain the tape or a transcription of it, the record reveals that the trial judge listened to the tape and determined that the language was distinguishable at least ninety percent of the time. Both the prosecutor and defense counsel restated a portion of the taped conversation in their closing arguments. Under these circumstances, we conclude that the record has adequately preserved the contents of the tape for our review of the trial court’s decision to admit the tape despite some inaudible portions. We further conclude that the record presents justification for the trial court’s decision, and thus we find no abuse of discretion.

Defendant next argues that the trial court erred when it refused to dismiss the supplemental information against him containing the fourth habitual offender enhancement. Defendant maintains that the trial court should have dismissed the supplemental information because it was filed twenty-two days after his arraignment on the underlying charges. Here, defendant was bound over by the district court and immediately thereafter consented to being arraigned on the charges in district court, rather than in circuit court, pursuant to a local rule.<sup>1</sup> Although a written information had not been prepared, both parties consented to proceeding with the arraignment. Thereafter, the district court conducted the arraignment and defendant waived the reading and receipt of the information at that time. Because defendant stood mute, the district court entered a plea of not guilty. Twenty-two days later, the prosecutor filed the information on the underlying charges and a supplement information containing the habitual offender enhancement.

According to the Michigan Court Rules, the prosecutor had only fourteen days after defendant’s arraignment to file the supplemental information:

A supplemental information charging the defendant with being an habitual offender may not be filed more than 14 days after the defendant is arraigned or has waived arraignment on the information charging the underlying felony, or after trial has begun if the defendant is tried within the 14-day period. [MCR 6.112(C).]

Pursuant to statute, the enhancement must be filed “within 21 days after the defendant’s arraignment on the information charging the underlying offense or, if arraignment is waived, within 21 days after the filing of the information charging the underlying offense.” MCL 769.13(1); MSA 28.1085(1); *People v Bollinger*, 224 Mich App 491, 493; 569 NW2d 646 (1997). In the present case, the prosecutor failed to file the supplemental information until twenty-two days after defendant’s arraignment in district court pursuant to local court rule, thus the supplemental information was untimely even under the

enlarged period for filing created by statute.<sup>2</sup> Further, the prosecutor has not filed a brief defending this practice. We can find no basis upon which to excuse the prosecutor's failure to timely file the supplemental information. Consequently, we vacate defendant's sentence under the habitual offender enhancement and remand to the trial court for resentencing solely on the underlying convictions.<sup>3</sup>

Defendant next argues that the trial court erred when it concluded that the audio tape was properly authenticated. We disagree. As discussed above, we review the trial court's decision for abuse of discretion. *Lukity, supra*. A decision on a close evidentiary question cannot ordinarily be an abuse of discretion. *People v Bahoda*, 448 Mich 261, 289; 531 NW2d 659 (1995).

MRE 901(a) provides that "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." The rule lists various methods by which authentication may be accomplished, including by "[t]estimony that a matter is what it is claimed to be," MRE 901(b)(1), and by "[a]pppearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances," MRE 901(b)(4). If a proponent shows a tape to be what he or she claims it to be, then the tape has been authenticated sufficiently to support its admission into evidence. *People v Berkey*, 437 Mich 40, 52; 467 NW2d 6 (1991).

Here, the prosecution claimed that the tape was a recording of the controlled purchase of marijuana on October 15, 1997. A police officer identified the Sony MC60 micro cassette and described the recorder that was placed in the informant's pocket and the procedure followed to activate the recorder, and testified that nothing had been added to or deleted from the tape. The informant testified that she received the recorder from the officers and never touched it until the officers recovered it. This testimony, coupled with the correspondence between the informant's testimony about her conversation with defendant and the tape itself, both of which the trial court had heard by the time it had to rule on the authentication of the tape, provided a sufficient basis for the court to rule the tape admissible. Thus, we find no abuse of discretion.

Defendant also argues that the trial court abused its discretion by admitting evidence of his other acts where the prosecution did not file the requisite notice or show good cause for the omission. We disagree. Again, we review evidentiary issues for an abuse of discretion. *Lukity, supra*.

During its examination of a police officer, the prosecution elicited testimony about an uncharged alleged drug sale by defendant on October 6, 1997, the circumstances of which violated police procedures for controlled purchases. MRE 404(b)(2) provides in part:

The prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial and the rationale . . . for admitting the evidence.

Although this rule requires that notice be given, it does not make admissibility dependent on notice, and it does not specify a sanction for failure to give notice. The rule exists in part to assist the trial court in ruling on admissibility of evidence under MRE 404(b) and prevent unfair surprise. *People v VanderVliet*, 444 Mich 52, 89 & n 51; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). At trial, the evidence was offered to illustrate police procedures for controlled purchases, the consequences of straying from the procedures, and the fact that the substance purchased was marijuana. The trial court found that the information assisted jurors by providing this background information. The court concluded that defense counsel suffered no real surprise from the identification of the substance as marijuana, since he received laboratory reports identifying the substance purchased on the other days as marijuana. We further note that the preliminary examination transcript also contains testimony about the October 6, 1997, purchase, further undermining a claim of surprise. The trial court decided to admit the evidence in light of the “rather wide ranging examination” it had granted defendant regarding the informant’s veracity and competence. The court also issued a cautionary instruction to the jurors. We find no abuse of discretion.

Even if the decision was in error, we note that reversal may only be had for preserved nonconstitutional error if the defendant demonstrates that the error more probably than not affected the outcome so as to result in a miscarriage of justice. *Lukity, supra* at 494. Whether erroneously admitted evidence requires reversal depends on the nature of the error and its effect in light of the weight of properly admitted evidence. *People v Smith*, 456 Mich 543, 555; 581 NW2d 654 (1998). In this case, a great deal of other evidence more effectively supported the conclusion that defendant committed the charged crimes. It is highly doubtful that but for the inclusion of the challenged evidence defendant would have been acquitted.

Finally, defendant contends that the trial court abused its discretion by denying his motion for mistrial based on the prosecution’s failure to give notice of its intent to use the other acts evidence. Because we have concluded that the court’s admission of the evidence, despite the prosecution’s failure to give notice of its intent to use the evidence, did not constitute an abuse of discretion in this case, we need not address this issue. However, we note that “[a] mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant, and impairs his ability to get a fair trial.” *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995) (citations omitted). Because the evidence concerning the October 6, 1997 purchase was of slight importance to the prosecution’s case, even if it was erroneously admitted, it did not deprive defendant of a fair trial.

Convictions affirmed, sentence vacated and matter remanded for further action consistent with this opinion. We do not retain jurisdiction.

/s/ William C. Whitbeck

/s/ Joel P. Hoekstra

/s/ Donald S. Owens

<sup>1</sup> Under a local court rule, Midland County Administrative Order 1997-1, promulgated under MCR 8.112(B) and Supreme Court Administrative Order 1992-5, and approved by the State Court Administrative Office, Midland County district courts are authorized to accept pleas in cases bound

over to the circuit court on consent of the parties following preliminary examinations or waivers of preliminary examinations.

<sup>2</sup> In *People v Shelton*, 412 Mich 565, 569; 315 NW2d 537 (1982), our Supreme Court stated that “a supplemental information is filed ‘promptly’ if it is filed not more than 14 days after the defendant is arraigned in circuit court...” MCR 6.112(C) contains the same filing period of fourteen days. However, by statute, the Legislature enlarged the time within which a prosecutor may file written notice of the intent to seek an habitual offender enhancement to twenty-one days. *People v Ellis*, 224 Mich App 752, 754; 569 NW2d 917 (1997). We acknowledge the inconsistency presented here; however, we need not address the inconsistency because the issue is not before us as the prosecutor’s filing of the supplemental information was late under either provision.

<sup>3</sup> Because we find defendant’s argument regarding his habitual offender status meritorious, we need not address defendant’s alternative argument that were we to conclude that his alleged waiver of arraignment was ineffective, then the trial court never obtained in personam jurisdiction over him. However, we note that this alternative argument is without merit because the record reveals that defendant was duly and properly arraigned on the charges pursuant to the local court rule.