STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN THOMAS NOWAK,

Defendant-Appellant.

UNPUBLISHED
October 3, 2000

No. 217763
Midland Circuit Court
LC No. 98-008914-FH

Before: Fitzgerald, P.J., and Holbrook, Jr., and McDonald, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of operating a vehicle under the influence of liquor, third offense (OUIL 3d), MCL 257.625(1); MSA 9.2325(1), and driving with a suspended license, second or subsequent offense, MCL 257.904(1); MSA 9.2604(1). Defendant also pleaded guilty to unlawful use of a license plate, MCL 257.256; MSA 9.1956. Defendant was sentenced as an habitual offender, fourth offense, MCL 769.12 MSA 28.1084, to concurrent prison terms of six to fifteen years for the OUIL 3d conviction, one year for the driving with a suspended license conviction, and ninety days for the unlawful use of a license plate conviction. We affirm.

Defendant first argues that the trial court erred in not granting his motion for mistrial after a police officer testifying as a prosecution witness mentioned defendant's prior imprisonment. We disagree. "The ruling on a motion for mistrial is committed to the sound discretion of the trial court. The test is whether the defendant has been deprived of a fair trial." *People v Hackney*, 183 Mich App 516, 531; 455 NW2d 358 (1990)(citations omitted). "[A] mistrial should be granted only where the error complained of is so serious that the prejudicial effect can be removed in no other way." *People v Lumsden*, 168 Mich App 286, 299; 423 NW2d 645 (1988).

The record clearly establishes that the police officer's brief reference to defendant's prior imprisonment was unresponsive to the question posed by the prosecutor. "As a general rule, unresponsive testimony by a prosecution witness does not justify a mistrial unless the prosecutor knew in advance that the witness would give the unresponsive testimony or the prosecutor conspired with or encouraged the witness to give that testimony." *Hackney, supra* at 531. There is no evidence that the

prosecutor either knew in advance that the reference would be made or that the prosecutor conspired with the officer.

Additionally, we believe any prejudice engendered by the remark could have been effectively dealt with by a cautionary instruction. The trial court stated that it would give a special instruction contemporaneous with the improper remark, but for strategic reasons, defense counsel rejected this offer. Further, defendant never requested that a cautionary instruction be given during the regular charge to the jury at the close of proofs. See *Lumsden*, *supra* at 299. Given these circumstances, and in light of the weight of the evidence, we conclude the trial court did not abuse its discretion in denying defendant's motion for mistrial.

Defendant also argues that his sentence of six to fifteen years' imprisonment for his OUIL 3d conviction is disproportionate. Again, we disagree. This Court reviews a trial court's sentence imposed on an habitual offender for an abuse of discretion. *People v Hansford (After Remand)*, 454 Mich 320, 324; 562 NW2d 460 (1997). "[A] trial court does not abuse its discretion in giving a sentence within the statutory limits . . . when an habitual offender's underlying felony, in the context of his previous felonies, evidences that the defendant has an inability to conform his conduct to the laws of society." *Id.* at 326. Defendant's sentence is within the statutory limits, and the record clearly establishes his inability to reform and conform his behavior to the laws of Michigan. *Id.* Accordingly, we hold that defendant's OUIL 3d sentence is not disproportionate to this offense and this offender. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990).

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Donald E. Holbrook, Jr.
/s/ Gary R. McDonald