

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOSE RABAGO, a/k/a JOSE MULTIPLE,

Defendant-Appellant.

UNPUBLISHED

October 19, 2004

No. 247896

Calhoun Circuit Court

LC No. 02-003805-FH

Before: Griffin, P.J., and Saad and O'Connell, JJ.

PER CURIAM.

Defendant appeals as of right his conviction of possession of less than twenty-five grams of cocaine, MCL 333.7403(2)(a)(v), entered after a jury trial. We affirm defendant's conviction and remand for preparation of a corrected presentence investigation report. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

A consensual patdown search of defendant's person revealed a small bag of cocaine in the watch pocket of his pants. At trial, a police officer testified that defendant made threatening comments after he was arrested, and, in response to the prosecutor's question as to whether the threats were the only verbal comments made by defendant, the officer stated that he believed that defendant made a statement regarding his purchase of the drugs. The trial court found that the statement was inadmissible, but denied defendant's request for a mistrial on the ground that the officer's answer was unresponsive and was not anticipated by the prosecutor. The trial court instructed the jury that it could not consider the officer's statement for any purpose whatsoever. Further, in response to questioning by the court, each juror stated that he or she could disregard the statement.

In general, an unresponsive, volunteered answer that injects improper evidence into a trial is not a basis for granting a mistrial unless the prosecutor knows in advance that the witness will give the testimony. *People v Hackney*, 183 Mich App 516, 531; 455 NW2d 358 (1990). However, police officers have a special duty to refrain from making prejudicial and irrelevant remarks during their testimony. *People v Holly*, 129 Mich App 405, 415-416; 341 NW2d 823 (1983). Such testimony, even if it is nonresponsive, may require reversal, *People v O'Brien*, 113 Mich App 183, 209; 317 NW2d 570 (1982), unless the other evidence clearly establishes the defendant's guilt. *People v Snider*, 239 Mich App 393, 419-420; 608 NW2d 502 (2000).

We review a trial court's denial of a motion for a mistrial for an abuse of discretion. A mistrial should be granted only for an irregularity that results in prejudice to the defendant and impairs his ability to get a fair trial. *People v Alter*, 255 Mich App 194, 205; 659 NW2d 667 (2003).

Defendant argues that the trial court abused its discretion by denying his motion for a mistrial. We disagree and affirm defendant's conviction. Nothing in the record supports a conclusion that the prosecutor knew in advance that the officer would repeat defendant's alleged statement regarding his purchase of drugs, or that the prosecutor conspired with or encouraged the officer to provide that testimony. *Hackney, supra*. Even if we assume that the officer's testimony constituted error, we conclude that reversal is not required because the other evidence clearly demonstrated defendant's guilt. A consensual patdown search revealed a bag of cocaine in defendant's pocket. The officer stated that the pocket was small and that he had a difficult time dislodging the bag. The jury was entitled to accept this testimony as credible and to reject defendant's theory that, unknown to him, a prostitute slipped the cocaine into his pocket. *People v Milstead*, 250 Mich App 391, 404; 648 NW2d 648 (2002). In light of the strength of the other evidence against defendant, *Snider, supra*, and in light of the fact that the trial court gave a strong cautionary instruction that the jury is presumed to have followed, *People v Dennis*, 464 Mich 567, 581; 628 NW2d 502 (2001), we conclude that the trial court did not abuse its discretion by denying defendant's motion for a mistrial. *Alter, supra*.

A presentence report must be prepared for the sentencing of each person convicted of a felony. MCL 771.14(1); MCR 6.425(A). A presentence report must include various information, including any statement the defendant wishes to make. MCR 6.425(A)(8).

Defendant argues that he is entitled to have a corrected presentence report prepared. We agree and remand this case with instructions that the trial court prepare a corrected presentence report and provide a copy of it to the Department of Corrections (DOC). Defendant raised a timely challenge to the accuracy of his statement regarding the incident in the report. MCR 6.429(C). The trial court agreed to strike defendant's statement from the presentence report, but apparently failed to do so. As the prosecutor concedes on appeal, defendant is entitled to have the correction made and to have a copy of the corrected report sent to the DOC. MCL 771.14(6); MCR 6.425(D)(3).

Defendant's conviction is affirmed but the matter is remanded for correction of the presentence report. We do not retain jurisdiction.

/s/ Richard Allen Griffin
/s/ Henry William Saad
/s/ Peter D. O'Connell