STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 20, 2009
v	No. 284831 Emmet Circuit Court
CARLOS EUGENE SAVAGE, JR., Defendant-Appellant.	LC No. 07-002888-FH

Before: Jansen, P.J., and Fort Hood and Gleicher, JJ.

PER CURIAM.

A jury convicted defendant of possessing less than 25 grams of cocaine, MCL 333.7403(2)(a)(*v*). The trial court sentenced defendant, as a third habitual offender, MCL 769.11, to an enhanced term of 18 months to 8 years' incarceration. Defendant appeals as of right. We affirm defendant's conviction and sentence, but remand for correction of his sentencing information report.

Defendant first contends that the trial court erred in denying two requests for a mistrial, which he lodged after two prosecution witnesses injected into the trial record the fact that defendant had been released from jail the day before his cocaine possession arrest. We review for an abuse of discretion a trial court's ruling whether to grant a mistrial. *People v Alter*, 255 Mich App 194, 205; 659 NW2d 667 (2003). A mistrial is warranted only when an error or irregularity in the proceedings prejudices the defendant "and impairs his ability to get a fair trial." *People v Bauder*, 269 Mich App 174, 195; 712 NW2d 506 (2005) (internal quotation omitted). "A trial court abuses its discretion when it fails to select a principled outcome." *People v Horn*, 279 Mich App 31, 35; 755 NW2d 212 (2008).

Before trial commenced, the prosecutor sought to admit evidence that shortly before defendant's arrest he was released from jail, but the trial court denied the motion on the basis that defendant's recent release had no bearing on any issue of consequence to the action, MRE 401, 402, and that even assuming some marginal relevance, the danger of unfair prejudice arising from the evidence substantially outweighed it. MRE 403. At trial, Petoskey police officer Adrian Carr testified concerning his encounter with defendant shortly before his arrest. The prosecutor elicited Carr's recollections that defendant had suggested that he took Vicodin, for which he did not possess a prescription, and the following exchange ensued:

Prosecutor: At that point, what happened with Mr. Savage?

Carr: Mr. Savage informed us that he was released from jail the day prior—oh, I'm sorry.

Defense Counsel: Objection, Judge.

The Court: Sustained. Stricken. Jurors, please disregard that.

* * *

Confine yourself to the events of the day in question . . . .

Defense counsel moved for a mistrial, citing the officer's "blatant disregard of the Court's order." The trial court denied the motion, explaining,

> Regarding the motion for a mistrial, a mistrial is properly granted only where necessary to prevent the defeat of justice, where there's been misconduct or some other impropriety that cannot be remedied by any action taken by the Court. The Court does not believe the record supports any misconduct by the prosecution. At best, a witness, who didn't remember his instructions well enough or otherwise, let slip with the accurate information that the defendant had been in jail. The Court does not believe that there's a circumstance that establishes that the defendant cannot have a fair trial. The Court immediately granted the defendant's objection and instructed the jury to disregard that evidence, and so the motion for a mistrial is denied.

Walter Demaray then began testimony in which he recounted that he knew defendant, had resided with defendant's girlfriend, and had sold illegal drugs from her residence. The following relevant exchange then took place:

Prosecutor: And where was Carlos staying when he was boyfriend/ girlfriend with Michele May?

Demaray: He was staying with her until he went to jail.

Defense counsel: Objection, Judge.

The Court: Sustained. Again, jury, please disregard that testimony. . . .

* * *

Please listen carefully to the questions and answer what you're asked sir, okay?

When the second day of trial commenced, defense counsel again moved for a mistrial, which the trial court again denied, reasoning,

> There was no time reference on that. It does not certainly appear to the Court that the prosecution had anything to do with eliciting that testimony or violating the Court's order that the information not be brought out. And the prosecutor has indicated that he endeavored to instruct Mr. Demaray not to mention that. So it's, at best, an inadvertent slip; at worst, an effort by Mr. Demaray to interject that matter, which he'd been told not to, into this record. In any event, it does not rise to the level, in the view of this Court, that it prevents the defendant from having a fair trial because the jury, again, was immediately instructed to disregard that, and so the motion for mistrial is denied.

After reviewing the entire record, we conclude that the trial court did not abuse its discretion in refusing to grant a mistrial because (1) the prosecutor did not intentionally elicit the references to defendant's recent release from incarceration, (2) the two references to defendant's status as an inmate occurred in an abbreviated and isolated fashion, and were not referenced thereafter by the prosecutor, see *People v Lumsden*, 168 Mich App 286, 299; 423 NW2d 645 (1988) (finding no abuse of discretion in the trial court's denial of a mistrial, despite that two witnesses injected comments suggesting that the defendant had committed an uncharged murder, given the fleeting nature of the remarks and the fact that they were not subsequently "emphasized to the jury"), (3) the trial court repeatedly instructed the jury to disregard the references to defendant's incarceration, immediately after each improper reference and again in the final jury instructions, see *Horn*, 279 Mich App at 36 (finding no grounds for a mistrial because the trial court "instructed the jury on the proper use of the other-acts evidence, and instructions are presumed to cure most errors"), and (4) the record reveals overwhelming, properly admitted evidence of defendant's guilt, including (a) the testimony of two witnesses that between 6:00 p.m. and 7:00 p.m. on the evening of October 4, 2007, defendant, his girlfriend, and another person arrived at a Petoskey Super 8 hotel room, purchased crack cocaine for sale there, split it amongst themselves, and smoked it in the bathroom, (b) at least two witnesses also recounted that later on October 4, 2007, between 8:00 p.m. and 9:00 p.m., they observed a third individual weigh out an "eight-ball" of crack, approximately three grams, which they transported to a store parking lot in anticipation of meeting defendant and his girlfriend there, (c) two witnesses inside the van that evening, and defendant's girlfriend, all similarly recalled that when the van arrived in the store parking lot, defendant approached a van window, grabbed a package of crack away from one of the van's occupants, returned to his vehicle and sped away, (d) two police officers testified that in the mid-afternoon of October 5, 2007, they went to defendant's girlfriend's house to execute a warrant for her arrest, and they encountered defendant in an upstairs bedroom littered with drug ingestion paraphernalia; the officers opined that defendant, who appeared jittery and had dilated pupils, was under the influence of a narcotic[1]; and (e) laboratory testing of a blood sample taken from defendant at 4:42 p.m. on October 5, 2007 revealed the presence of two primary cocaine metabolites. See *People v Holly*, 129 Mich App 405, 415-416; 341 NW2d 823 (1983) (affirming the trial court's denial of a mistrial on the basis that, "despite the undeniable prejudice of the [improperly injected] testimony," "[t]he evidence against [the defendant] was simply too strong").

[1] The officers denied that defendant emanated an odor of intoxicants.

Defendant also submits that the sentencing information report erroneously documents the scoring of offense variable (OV) 14 at 10 points, when the trial court expressed on the record its intent to score OV 14 at zero points. The Legislature authorized scoring OV 14 at 10 points if "[t]he offender was a leader in a multiple offender situation." MCL 777.44(1)(a). When the parties addressed the proper scoring of OV 14 at defendant's sentencing hearing, the trial court observed, "I've read your response, [defense counsel]. I tend to agree with your response, so I'll give [the prosecutor] an opportunity to try and change my mind verbally, if he wishes." The prosecutor replied, "No, I'll stand with my argument," and the trial court noted, "All right," then turned to consider other variables. Because the trial testimony of defendant's girlfriend did tend to support defense counsel's sentencing response concerning OV 14, specifically that she recruited defendant's participation in the October 4, 2007 cocaine theft and drove him to the store parking lot where he took possession of the crack, we cannot characterize as an abuse of discretion the trial court's sentencing hearing decision to assign zero points to OV 14. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002) (explaining that a "sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score," and that "[s]coring decisions for which there is any evidence in support will be upheld") (internal quotation omitted). Furthermore, the trial court correctly calculated the minimum sentence range under the statutory sentencing guidelines for defendant's class G offense, enhanced for his status as a third felony offender, at 0 to 25 months. MCL 777.13m; MCL 777.21(3)(b); MCL 777.68. And the court properly imposed a minimum sentence within this range, MCL 769.34(2), which we affirm. MCL 769.34(10). However, we remand for administrative correction of the sentencing information report to reflect a scoring of zero points for OV 14.[2] *People v Melton*, 271 Mich App 590, 593, 596; 722 NW2d 698 (2006).

We affirm defendant's conviction and sentence, but remand for administrative correction of the sentencing information report consistent with this opinion. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ Karen M. Fort Hood
/s/ Elizabeth L. Gleicher

[2] Although defendant's brief on appeal also raises an allegation of error with respect to OV 13, defense counsel withdrew this issue at oral argument.