

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT LEE IVORY,

Defendant-Appellant.

UNPUBLISHED

December 30, 1997

No. 196884

Oakland Circuit Court

LC No. 95-142658 FH

Before: Griffin, P.J., and Markman and Whitbeck, JJ.

MEMORANDUM.

Defendant was convicted by jury of delivery of less than fifty grams of cocaine, MCL 333.7401(1) and (2)(a)(iv); MSA 14.15(7401)(1) and (2)(a)(iv), and soliciting prostitution, MCL 750.448; MSA 28.703. He received an enhanced sentence of four to forty years' imprisonment on the delivery conviction, reflecting his status as a repeat drug offender, MCL 333.7413(2); MSA 14.15(7413)(2), and a term of incarceration of ninety days on his solicitation conviction. Defendant appeals as of right. We affirm defendant's convictions and sentences, but remand for the purely administrative function of the preparation of a sentencing information report.

The trial court abused its discretion, *People v Catanzarite*, 211 Mich App 573, 579; 536 NW2d 570 (1995), by admitting evidence that defendant was involved in cocaine related activities in 1991 and 1989. Even if this evidence was technically relevant to show that defendant knew what cocaine was and that there was a market for it, it should have been excluded because its only significant relevance was to show defendant as having a criminal propensity in violation of MRE 404(b) given the defense that defendant intended to use the cocaine at issue not deliver it to another. Thus, any probative value of the prior acts evidence was substantially outweighed by the danger of unfair prejudice. *Id.* at 578-579; see also *People v VanderVliet*, 444 Mich 52, 91; 508 NW2d 114 (1993), modified on other grounds 445 Mich 1205 (1994) (prosecutor should not be allowed to introduce other acts evidence only because it is technically relevant). Nevertheless, the error was harmless under the standard for nonconstitutional error. Defendant has failed to show a reasonable probability that the error affected the outcome of trial where the undercover officer testified that defendant sold her a rock of crack cocaine for \$20, at the time of his arrest defendant was in possession of the \$20 bill the officer

gave him -- the bill being easily identifiable because it had been photocopied before it was given to the officer -- and defendant lacked any paraphernalia to smoke the crack cocaine at the time of his arrest. *People v Sabin*, 223 Mich App 530, 540, n 2; 566 NW2d 677 (1997).

Because defendant was sentenced under the second- or subsequent-offender provision of the controlled substances act, MCL 333.7413(2); MSA 14.15(7413)(2), the sentencing guidelines do not apply. *People v Williams*, 205 Mich App 229, 231; 517 NW2d 315 (1994). Accordingly, the trial court's failure to prepare a sentencing information report does not entitle defendant to resentencing. *People v Yeoman*, 218 Mich App 406, 419-423; 554 NW2d 577 (1996). Instead, this case should be remanded for the purely administrative function of the preparation of a sentencing information report. *Id.* at 423.

The court did not abuse its sentencing discretion in light of defendant's nine prior felony and three prior misdemeanor convictions, defendant's parolee status at the time of the commission of the instant offenses, defendant's "absconder from parole" status at the time of the instant offenses and his history of substance abuse. *People v Hansford (After Remand)*, 454 Mich 320, 326; 562 NW2d 460 (1997).

Affirmed, but remanded purely for the administrative function of the preparation of a sentencing information report. We do not retain jurisdiction.

/s/ Richard Allen Griffin

/s/ Stephen J. Markman

/s/ William C. Whitbeck