IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. ROBBIE DEAN FETTERS, Defendant.	No. 4:10-cr-00036 **ORDER**

This matter comes before the Court pursuant to Defendant Robbie Dean Fetters' oral motion for mistrial made on March 30, 2011. [Dkt. No. 206.] At the four-day jury trial, the government was represented by Mary Luxa and the defendant was represented by Alfredo Parrish. Counsel for defendant moved for a mistrial after the conclusion of the government's evidence and the Court reserved ruling.

On March 31, 2011, the jury convicted the defendant of seven of the eight counts submitted to the jury. Based on the following, the Court denies the motion for mistrial.

I. BACKGROUND

The defendant was charged in eight counts of an indictment. Counts One and Nine charged the defendant as being a felon in possession of a firearm or ammunition in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). Count Three charged the defendant with conspiracy to distribute five grams or more of methamphetamine pursuant to 21 U.S.C. § 841(a)(1). Counts Four and Five charged the defendant with distribution of a mixture and substance containing methamphetamine, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(C). Counts Six and Eight charged the defendant with possessing a firearm in furtherance of a drug crime pursuant to 18 U.S.C. § 924(c)(1)(A)(I). Lastly, Count Seven charged the defendant with possession with intent to distribute five grams or more of actual

methamphetamine in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B).

A four-day jury trial began on March 28, 2011. [Dkt. No. 203.] Defense counsel contends that three separate instances of prejudicial testimony by three separate witnesses (Brian Jeffries, Jimmy Tibbon, and Matthew Jenkins) are grounds for a mistrial.

The Government called a cooperating informant, Brian Jeffries, to testify about two controlled buys and observing firearms at the defendant's residence. During the cross-examination of Jeffries on March 29, 2011, defense counsel asked him:

> Q. Prior to the time you became a confidential informant when is the last time you had seen him? I am asking you when was the last day you had seen him prior to the time that you became a confidential informant which means before the time you agreed to be an informant? Do you understand the question?
>
> . . .
>
> A. Last time I seen him was at his house over on Grand Avenue before he got locked up for some kind of gun charge.
>
> . . .
>
> Q. Did I ask you any question about any charges?
> A. No.
> Q. Why did you answer the question that way?
> A. Because that was the last time I seen him.
> Q. Did anyone instruct you not to answer the question in that fashion?
> A. No.
> Q. So you have not met with anyone who told you not to ask – answer the question that way, is that your response to my question?
> A. I haven't met with anybody that has any way told me any way to respond to you, no.

Outside the presence of the jury, defense counsel moved for a mistrial on the basis that the testimony elicited statements about a prior gun charge. He argued that "the jury really caught it and paid that much attention to it" but conceded that his follow-up questions revealed that "the witness pretty much volunteered [the information about the prior gun

charges] on his own." The Government argued that the statement was not prejudicial "particularly when they have stipulated that he is a prior convicted felon." The Court reserved ruling on defendant's motion.

Officer Jimmy Tibbon testified against the defendant later that same day. He was a jailer at a correctional facility and testified about searching the defendant. In the midst of his direct examination about his pat-down search of the defendant, Officer Tibbon stated that he asked the defendant to remove his shirt because, "I worked at the jail for almost three years now, dealt with Inmate Fetters on several occasions inside of the jail. I know he has health problems." Defense counsel moved to strike the testimony and the Court responded "That testimony is stricken. The jury shall disregard it. Just talk about this day, please."

Outside the presence of the jury, defense counsel renewed his motion for a mistrial "on the basis that the jailer said he dealt with [the defendant] over three years at the jail." The Government resisted and argued that because there was a stipulation of a prior felony conviction, "[t]here's nothing to say that that wasn't because a result of his prior conviction." The Court reserved ruling.

Lastly, during the direct examination of Mid Iowa Drug Task Force Officer Matthew Jenkins on March 30, 2011, the prosecutor asked him about why the defendant's vehicle did not match the license plate's registration:

> A. There's several reasons basically to change the plates for several reasons. . . . Change the license plate on the front or back of the cars, depending on what they want to do, the car also may be an illegal car, may be stolen, taken without the owner's consent so it kind of changes things up. They run the plate on the vehicle, that doesn't match the vehicle, it may come back to one of you and then you have a valid driver's license, you have no criminal history, no record, and then the officer may run it, continue his day, so that's very –
>
> Q. I just want to make clear though, you are not saying that Mr. Fetters was driving a stolen vehicle that day, you don't –

> A. I don't know, no; but it is common –
> Q. I want to make that clear because –
> A. No, it is just common for people, you know, drug dealers, people who steal cars, that's what they do is they change plates out so it protects the car –

Counsel for the defendant then objected and the Court stated, "There is no evidence or even allegation that Mr. Fetters did such a thing. I am going to strike that last portion of the testimony. Let's just move on."

After the government rested on March 30, 2011, and outside the presence of the jury, defense counsel renewed and expanded upon his motion for a mistrial:

> MR. PARRISH: . . . Well, Judge, I just wanted to reurge as if made at the time that we, in fact, submitted it to the Court when Mr. Jeffries testified when he brought up that Mr. Fetters had been in jail at the time when I asked him about a date for stolen guns, I believe a gun or in jail before –
> THE COURT: I think he said locked up on a gun charge.
> MR. PARRISH: Gun charge, you're right. Then the jailer brought up the fact that I have dealt with him for three years at the jail several times, that was the answer to the question that was uninvited by the prosecution and we concede that point and also you couple that with Mr. Jenkins' testimony this morning about the stolen car, but I believe the Court – I am not saying it excuses what he said, but the Court immediately and I believe Ms. Luxa also tried to cut that short.
>
> I made an earlier objection because I sensed the direction it was going to go in, but if you add those three things together, Judge, in a case like this, I think it creates serious 403 problems that can't be corrected by a cautionary instruction or otherwise. For those reasons, we believe that those three entrants into the trial, this particular trial specifically where it is a gun charge and guns came out from one of the state's key witnesses, Mr. Jeffries, we believe we should be entitled to a mistrial and request the Court to grant one.

The Court reserved ruling on the motion for a mistrial. In the final jury instructions, the Court instructed the jury that:

> Certain things are not evidence. I will list those things again for you now:
> 1. Statements, arguments, questions and comments by lawyers representing the parties in the case are not evidence.
> 2. Objections are not evidence. Lawyers have an obligation to object when they believe something is improper. You should not be influenced by the objection. If I sustained an objection to a question, you must ignore the question and must not try to guess what the answer might have been.
> 3.Testimony that was stricken or I told you to disregard is not evidence and must not be considered.
> . . .
>
> Other than the stipulation that the defendant, Robbie Dean Fetters, has been convicted of a crime punishable by imprisonment for more than one year, there is no evidence of any criminal conviction of the defendant for any other crime. Do not speculate about what he was convicted for. If it had any bearing on the issues remaining for your consideration, you would be provided with that information. There is great danger in assuming that solely because a person has been convicted in the past, he or she is more likely guilty of the charges in a trial. It would be a violation of your sworn duty to make such an assumption.

[Dkt. No. 205 at 2.]

The jury began its deliberation in the afternoon of March 30, 2011, and returned to its deliberation on March 31, 2011. The jury reached a verdict after almost five hours of deliberation. During that time, the jury sent four questions to the Court, with three of the four questions related to the counts of possessing a firearm in furtherance of a drug crime.

The jury found the defendant guilty of Counts One, Three, Four, Five, Seven, and Eight. On the verdict form, it answered two interrogatories, specifically finding the defendant guilty of conspiracy to distribute more than five grams of methamphetamine and possession with intent to distribute more than five grams of methamphetamine. The jury acquitted the defendant of Count Six, possession of a firearm in furtherance of a drug trafficking crime.

The Court addresses defendant's motion for a mistrial on the basis of the testimony of Jeffries, Tibbon, and Jenkins. The defendant argues the testimony was prejudicial and incapable of correction with cautionary or limiting instructions. The Court considers the statements made in light of the testimony from the entire trial and finds that the statements were not prejudicial.

II. ANALYSIS

A district court has broad discretion in determining whether a defendant has been so prejudiced as to require a mistrial. *United States v. Robinson*, 774 F.2d 261, 277 (8th Cir. 1985); *United States v. Encee*, 256 F.3d 852, 854 (8th Cir. 2001). "The prejudicial effect of any improper testimony is determined by examining the context of the error and the strength of the evidence of the defendant's guilt." *United States v. Hollins*, 432 F.3d 809, 812 (8th Cir. 2005) (citing *United States v. Nelson*, 984, F.2d 894, 897 (8th Cir. 1993)). "The remedy of a mistrial is a drastic one, and certainly not the only way an error could have been cured." *United States v. Gundersen*, 195 F.3d 1035, 1037-38 (8th Cir. 1999) (citing *Burns v. Gammon*, 173 F.3d 1089, 1097 (8th Cir. 1999)).

There is a two-part test in determining whether prosecutorial questions, statements, or remarks should have resulted in a mistrial. The Court considers "whether the 'remarks were in fact improper and, if so, whether they prejudicially affected the defendant['s] substantial rights so as to deprive [him] of a fair trial." *United States v. Wadlington*, 233 F.3d 1067, 1077 (8th Cir. 2000) (quoting *United States v. Figueroa*, 900 F.2d 1211, 1215 (8th Cir. 1990)) (alterations in original). The Court must weigh the impact of the statements by considering: "1) the cumulative effect of the misconduct; 2) the strength of the properly admitted evidence; and 3) the curative actions taken by the [C]ourt." *Id.* (alteration added). Finally, in weighing the impact of the statements, the Court notes that "[t]he prejudicial impact of an improper question is assessed in the context of the entire trial." *United States v. Brown*, 903 F.2d 540, 542 (8th Cir. 1990) (citing *United States v. O'Connell*, 841 F.2d

1408, 1428 (8th Cir. 1988), *cert. denied*, 488 U.S. 1011 (1989)).

Prejudicial testimony can be cured in a variety of ways. For example, "[a]dmission of a prejudicial statement is normally cured by striking the testimony and instructing the jury to disregard the remark." *United States v. Lockett*, 601 F.3d 837, 841 (8th Cir. 2010) (citing *United States v. Urick*, 431 F.3d 300, 304 (8th Cir. 2005)) (alteration added). "[O]ne objectionable statement by a prosecution witness [i]s not sufficient to create prejudicial error." *Hollins*, 432 F.3d at 812 (quoting *United States v. Cole*, 380 F.3d 422, 427 (8th Cir. 2004)) (alteration added). This is because a "relatively fleeting" reference to an improper subject is unlikely to "taint[] the jurors' minds[, such] that they [will] disregard[] all exculpatory evidence in [the defendant's] favor." *Wadlington*, 233 F.3d at 1078 (alterations added). Further, cross-examination of a witness by defense counsel can mitigate any improper or prejudicial questions made to a witness, and likewise, on re-direct, a prosecutor can eliminate any confusion caused by previous questions. *See Robinson*, 774 F.2d at 277.

Prejudice can also be cured by limiting instructions. A cautionary instruction given at the close of evidence can instruct jurors to disregard testimony that may have been inadvertently or negligently elicited. *See Gundersen*, 1953 F.3d at 1038. It is an "almost invariable assumption of the law that jurors follow their instructions." *Richardson v. Marsh*, 481 U.S. 200, 206-07 (1987).

Here, none of these statements made by the witnesses were so prejudicial so as to be incurable. Mr. Jeffries' statement that he had last seen the defendant "before he got locked up for some kind of gun charges" was not intentional misconduct by the witness or the government. Defense counsel had very specifically and carefully asked the question and Mr. Jeffries simply volunteered extra information that assisted him in answering the questions posed. This is evidenced by defense counsel's follow-up questions to have Mr. Jeffries identify a specific date. Defense counsel did not deliberately elicit the incriminating answer and his questioning also revealed that Mr. Jeffries had not been coached to give an answer specifically referring to "gun charges."

Moreover, the jury knew Mr. Jeffries was a jailhouse informant both through his testimony and through admission of Mr. Jeffries' plea agreement as Exhibit 25. The jury, as a result, had to know that the defendant had been in jail. The jury was also informed that there was a stipulation that the defendant had one prior felony conviction. [Exh. 29.] Mr. Jeffries' answer referring to gun charges was a product of confusion as opposed to any deliberate attempt to introduce inadmissible evidence. *See Robinson*, 774 F.2d at 277.

For similar reasons, the Court finds that detention Officer Tibbon's comment that he had dealt with the defendant on previous occasions was not prejudicial. It was a fleeting comment and the Court immediately granted defense counsel's motion to strike. *Hollins*, 432 F.3d at 812. Defense counsel even conceded that this answer was "uninvited." The Court also considers that this line of questioning was immediately stopped and defense counsel did not feel the need to cross-examine Officer Tibbon's at all, or, just on the basis of his inadvertent statement. *See Brown*, 902 F.2d at 542 (finding a reference to pretrial detention was not prejudicial because there was overwhelming evidence against the defendant). In fact, the jury could again infer that Officer Tibbon's interaction with the defendant was related to the defendant's stipulation of a prior felony. Any prejudice from this statement was cured by the Court's admonishment to strike the testimony and the prosecutor's immediate curtailment of the line of questioning. *Wadlington*, 233 F.3d at 1078; *see also United States v. Wilson*, 665 F.2d 825, 829 (8th Cir. 1981), *cert. denied*, 456 U.S. 994 (1982) (district court's denial of defendant's motion for mistrial proper where Government's improper questioning stemmed from confusion rather than prosecutorial misconduct).

As to the third witness, the Court finds that Officer Jenkin's testimony about drug dealers switching license plates to disguise stolen cars was not prejudicial especially in light of the Court's immediate comments. The prosecutor's question referred to reasons why a license plate would not match a car. Once Officer Jenkin's touched on the possibility that some drug dealers switch plates to disguise stolen cars, the prosecutor stopped him mid-sentence. She also very firmly clarified that *this* was not such an instance where the car was

stolen. The Court followed by issuing a very stern cautionary instruction to the jury to disregard that portion of the testimony. Although perhaps an inartful question, there is no evidence the prosecutor deliberately elicited that testimony. *Wilson*, 665 F.2d at 829.

Lastly, the Court considers the testimony of these witnesses in light of the very strong cautionary instructions given in the final jury instructions. The reference to the defendant's prior gun charge or time spent in jail were cured by the instruction to only consider the stipulation as evidence of a criminal conviction, and not any other reference to other criminal convictions or time spent in jail. *See Richardson*, 481 U.S. at 206-07. As these statements related to a gun charge, the Court's concern about prejudice is diminished by the fact that the jury acquitted the defendant of a gun charge. It was apparent from the acquittal that the jury was capable of parsing out the evidence and considering only the evidence it was instructed to consider. *See, e.g., United States v. Pemberton*, 121 F.3d 1157, 1166 (8th Cir. 1997) (finding that any prejudice from an IRS agent's opinion that a particular transaction constituted money laundering was cured by jury's acquittal of "all the money-laundering charges" and that any "spillover prejudice" "was adequately cured by the court's repeated instruction to the jury to disregard the testimony.").

Further evidence of the jury disregarding stricken testimony comes from the questions it asked the Court during deliberations. The jury specifically asked whether it could find the defendant guilty of possessing a "pistol" if recorded conversations between Mr. Jeffries and the defendant referred to a "rifle." This question, and others, show the jury's meticulous thought process, their adherence to the instructions, and concern for fairness.

Where there is substantial evidence of a criminal defendant's guilt, a district court may properly deny a motion for mistrial. *United States v. Weaver*, 554 F.3d 718, 724 (8th Cir. 2009); *see also Lockett*, 601 F.3d at 841 ("If residual prejudice survived this curative instruction from the court, that prejudice is harmless when compared to the substantial evidence of Lockett's guilt."). For example, in *United States v. Beal*, 430 F.3d 950, 955 (8th Cir. 2005), the defendant argued the prosecution improperly encouraged a witness to testify

about inadmissible prior criminal history by asking an overly broad question. *Id.* The court noted that the comments were made in a trial that lasted two days and had eighteen witnesses. *Id.* The defendant had approved a curative instruction from the court and there was "no indication the jury was inclined to disregard the instruction." *Id.* (citation omitted). The court held that the district court did not abuse its discretion in denying the motion for mistrial because there was overwhelming evidence of guilt. *Id.*

Here, there was also overwhelming evidence of the defendant's guilt. He was arrested with a gun and drugs in his possession and police officers found a gun hidden in a vent at his residence. There were tape recordings of controlled buys and he was arrested with a large quantity of high purity methamphetamine on his person.

In conclusion, in the context of the entire trial the statements were not so prejudicial as to deny the defendant a fair trial. *Brown*, 903 F.2d at 542. The cumulative effect of the statements was negligible considering that the trial spanned four days and had thirteen witnesses. The jury also found the defendant guilty of seven of the eight counts and acquitted the defendant of a gun charge. Further, the Court's curative instructions throughout the trial and in the final jury instructions mitigated any prejudice resulting from the statements. *See Wadlington*, 233 F.3d at 1077.

Upon the foregoing,

IT IS ORDERED

That the Defendant's March 30, 2011 Motion for Mistrial [Dkt. No. 206] is denied.

DATED this 8th day of April, 2011.

JOHN A. JARVEY
UNITED STATES DISTRICT JUDGE
SOUTHERN DISTRICT OF IOWA