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' Motion for New Trial pursuant to Fed. R. Crim. P. 33(a) filed on April 11, 2011. [Dkt. No. 224.] The government filed a response on April 18, 2011. [Dkt. No. 225.]

A four-day jury trial began on May 28, 2011, with the government represented by Mary Luxa and the defendant represented by Alfredo Parrish. Counsel for defendant moved for a mistrial after the conclusion of the government's evidence on the basis that prejudicial testimony by three separate witnesses (Brian Jeffries, Jimmy Tibbon, and Matthew Jenkins) were grounds for a mistrial. The Court reserved ruling on the motion. On March 31, 2011, the jury convicted the defendant of seven of the eight counts submitted to the jury. On April 8, 2011, the Court denied defendant's motion for mistrial. [Mistrial Order, Dkt. No. 223.]

For the reasons set forth below, the Court denies the defendant's Motion for New Trial.

I. FACTS

The grand jury returned a superseding eight-count Indictment in this matter on May 27, 2010. [Dkt. No. 30.] The defendant was charged with being a felon in possession of a firearm or ammunition in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2) (Counts One and Nine); conspiracy to distribute five grams or more of methamphetamine pursuant to 21 U.S.C. § 841(a)(1) (Count Three); distribution of a mixture and substance containing

methamphetamine, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(C) (Counts Four and Five); possessing a firearm in furtherance of a drug crime pursuant to 18 U.S.C. § 924(c)(1)(A)(I) (Counts Six and Eight); and 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) (Count Seven).

At trial, three government witnesses brought to the jury's attention potentially prejudicial information regarding the defendant's criminal background.[1] Brian Jeffries, a confidential informant, referred to a prior gun charge in his testimony.[2] Officer Tibbon then testified about his pat-down search of the defendant at a jail and 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." Lastly, testimony from Officer Matthew Jenkins referred to situations where stolen cars oftentimes have license plates that do not match vehicle registration documents.[3]

In each instance, the Court sharply curtailed the testimony from these witnesses

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[1]The Court's April 8, 2011 Mistrial Order recounts in greater detail the specific testimony.

[2]"Last time I seen him was at his house over on Grand Avenue before he got locked up for some kind of gun charge."

[3]

> 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 –
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> . . .
>
> 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 –

touching on the proscribed content. As an additional cautionary measure, the Court gave a limiting instruction in the final jury instructions.[4]

On March 31, 2011, the jury found the defendant guilty of Counts One, Three, Four, Five, Seven, and Eight, and acquitted the defendant of Count Six. During its deliberations, the jury asked the Court four questions, with three of the four questions related to the counts of possessing a firearm in furtherance of a drug crime. The Court had reserved ruling on the defendant's mistrial motion—on the basis of the testimony of Jeffries, Tibbon, and Jenkins— after the government rested, but denied the motion on April 8, 2011.

The Court addresses defendant's motion for new trial on essentially the same grounds as his mistrial motion. The defendant argues the testimony of the three witnesses was unfairly prejudicial because, "(1) it generalized Fetters' earlier bad acts into bad character, . . . and (2) it may have called for preventive convictions by the jury even though Fetters was innocent of some or all of the crimes charged." [Mistrial Motion, Dkt. No. 224 at 2.] He urges the Court to find that the cumulative effect of the testimony deprived the defendant of a fair trial. [Mistrial Motion Brief, Dkt. No. 224-1 at 4.] The defendant does not raise a sufficiency of the evidence argument. The Court considers the statements made by the three witnesses, and their cumulative effect, and finds that the interests of justice do not warrant a new trial.

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[4]

> 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.

[Final Jury Instructions, Dkt. No. 205 at 2.]

II. Conclusions of Law

A. Motion for New Trial Standard

A district court may grant a new trial if the interests of justice so requires. Fed. R. Crim. P. 33(a). The Rule 33 remedy should be used sparingly and with caution. *United States v. Dodd*, 391 F.3d 930, 934 (8th Cir. 2004). The trial court may exercise its broad discretion in considering the motion, *United States v. Cannon*, 88 F.3d 1495, 1502 (8th Cir. 1996), and has broader discretion in granting a new trial than it does in granting a judgment of acquittal. *United States v. Boesen*, 473 F. Supp. 2d 932, 941 (S.D. Iowa 2007) (citing *United States v. Campos*, 306 F.3d 577, 579 (8th Cir. 2002)); *see United States v. Starr*, 533 F.3d 985, 999 (8th Cir. 2008). Unlike a motion for a judgment of acquittal, the district court need not examine the evidence in the light most favorable to the government. *United States v. Gascon-Guerrero*, 382 F. Supp. 2d 1097, 1102 (S.D. Iowa 2005). A court may weigh evidence and evaluate for itself the credibility of witnesses to determine if a miscarriage of justice may have occurred. *Starr*, 533 F.3d at 999; *United States v. Davis*, 103 F.3d 660, 668 (8th Cir. 1998); *United States v. Rodriguez*, 812 F.2d 414, 417 (8th Cir. 1987).

Motions for new trials based on the weight of evidence are generally discouraged, and the authority to grant such a motion should be exercised "sparingly" and "with caution." *United States v. Lincoln*, 630 F.2d 1313, 1319 (8th Cir. 1980). The jury verdict is to be upheld, unless the court determines that a miscarriage of justice will occur. *United States v. Johnson*, 403 F. Supp. 2d 721, 766 (N.D. Iowa 2005) (quoting *Campos*, 306 F.3d at 579). Nonetheless, a new trial may be granted under several scenarios. First, a new trial may be granted "if the evidence weighs heavily enough against the verdict that a miscarriage of justice occurred." *Ortega v. United States*, 270 F.3d 540, 547 (8th Cir. 2001) (quoting *United States v. Lacey*, 219 F.3d 779, 783 (8th Cir. 2000)). Second, even if there is sufficient evidence to sustain a verdict, but a preponderate of evidence weighs "sufficiently heavily against the verdict that a serious miscarriage of justice may have occurred, [the court] may set aside the verdict, grant a new trial, and submit the issues for determination

by another jury." *United States v. Walker*, 393 F.3d 842, 847-48 (8th Cir. 2005) (alteration added); *see also United States v. Lewis*, 436 F.3d 939, 945 (8th Cir. 2006). The cumulative effect of alleged errors may warrant a new trial where "'the case as a whole presents an image of unfairness that has resulted in the deprivation of a defendant's constitutional rights, even though none of the claimed errors is itself sufficient to require reversal.'" *United States v. Montgomery*, 635 F.3d 1074, 1099 (8th Cir. 2011) (quoting *United States v. Samples*, 456 F.3d 875, 887 (8th Cir. 2006)); *see also United States v. Anwar*, 428 F.3d 1102, 1114 (8th Cir. 2005). In both of these circumstances, a district court may abuse its discretion when it "fails to consider a factor that should have been given significant weight, considers and gives significant weight to an improper or irrelevant factor, or commits a clear error of judgment in considering and weighing only proper factors." *Campos*, 306 F.3d at 580.

B. Analysis

Defendant urges the Court to grant the motion for a new trial and find that the witness' testimony "unfairly highlighted propensity evidence." [Dkt. No. 224 at 2.] He asserts that the "cumulative effect of the improper statements" of the "critical witnesses" created an "unfair prejudice" problem under Fed. R. Evid. 403.[5] *Id.* at 5. Although the defendant concedes the statements were not a result of prosecutorial misconduct, he urges the Court to evaluate the statements using the prosecutorial misconduct standard, when the improper remarks "prejudicially affect the defendant's substantive rights so as to deprive the defendant of a fair trial." [Dkt. No. 224-1 at 3-4.] He cites to *United States v. Beeks*, for the

[5]Rule 403 of the Federal Rules of Evidence operates to exclude probative evidence if its probative value is substantially outweighed by the dangers of unfair prejudice. Fed. R. Evid. 403. Probative evidence may be excluded if it would lead the fact-finder to declare guilt on collateral grounds outside of proof specific to the charged offense. "The critical issue is the degree of unfairness of the prejudicial evidence and whether it tends to support a decision on an improper basis." *United States v. Payne*, 119 F.3d 637, 645 (8th Cir. 1997), *cert. denied*, 522 U.S. 987 (1997).

analysis of whether there was a fair trial. 224 F.3d 741, 746 (8th Cir. 2000) (court should consider (1) the cumulative effect of the statements; (2) the strength of the properly admitted evidence of his guilt; and (3) the court's curative actions).

The government asserts that the statements were not prejudicial and did not result in an unfair trial. The government counters that the "more appropriate standard [for analyzing the statements] is that utilized in evaluating improper testimony." [Govt's Resistance, Dkt. No. 225 at 1.] The Court should, the government argues, look at the "context of the testimony and the prejudice created by it, as juxtaposed against the strengths of the evidence of the defendant's guilt." *Id.* at 1-2 (quoting *United States v. Sherman*, 440 F.3d 982, 987-88 (8th Cir. 2006)).

Here, the defendant concedes there was not prosecutorial misconduct because the witnesses volunteered the statements. Thus, in considering whether to grant a new trial on the basis of improper testimony, the Court looks at the "prejudicial effect of any improper testimony . . . 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) (citation omitted). "'It is generally within the discretion of the district court to decide whether the fairness of a trial has been compromised by prejudicial testimony . . . .'" *United States v. Espinosa*, 585 F.3d 418, 428 (8th Cir. 2009) (quoting *United States v. Brandon*, 521 F.3d 1019, 1026 (8th Cir. 2008)). Courts should consider improper comments in the context of the entire trial, *United States v. Summer*, 171 F.3d 636, 637-38 (8th Cir. 1999) (citing *United States v. Brown*, 903 F.2d 540, 542 (8th Cir. 1990)), because "relatively fleeting" references to improper subjects are unlikely to infect the fairness of the overall trial. *See United States v. Wadlington*, 233 F.3d 1067, 1078 (8th Cir. 2000). Further, a court can cure any suggestion of prejudice by striking testimony, instructing jurors to disregard a witness's remark, or giving a cautionary instruction at the close of evidence. *See id.*; *United States v. Gundersen*, 195 F.3d 1035, 1037-38 (8th Cir. 1999). And when "the evidence of guilt is substantial," a district court may conclude "that the allegedly improper testimony was

harmless." *Espinosa*, 585 F.3d at 428.

Defendant alleges that statements volunteered by three witnesses unfairly prejudiced his chances of a fair trial. He asserts that three comments—two references to prior incarceration or convictions and that drug dealers often drive stolen cars—cumulatively resulted in a fundamentally incurable and unfair trial. This Court surveys other cases to determine if similar statements resulted in unfair prejudice. In *United States v. Hollins*, 432 F.3d 809, 811-12 (8th Cir. 2005), the defendant argued that a witness's statement—that she had observed the defendant's picture in a mug shot prior to identifying him in a photographic line-up—was prejudicial. The defendant argued that the reference to an earlier mug shot "caused the jury to conclude that he had a prior criminal record and was predisposed to criminal activity." *Id.* at 812. The court disagreed, finding that in conjunction with the "wide array of testimony against Hollins," there was not any prejudicial error created by "one objectionable statement by a prosecution witness." *Id.* Likewise, in *United States v. Wadlington*, a government witness testified that "Wadlington remarked that he had 'already done his time'" when he was arrested. 233 F.3d at 1078. The court found there was no prejudice from an improper comment about prior criminal history because "the cautionary instruction [the court immediately gave to the jury] was sufficient to allay any risk of undue prejudice." *Id.* (alteration added).

A similar situation arose in *United States v. Flores*, 73 F.3d 826 (8th Cir. 1996). In *Flores*, the Eighth Circuit Court of Appeals held that any alleged prejudice from inadvertent testimony elicited about prior criminal dealings could have been cured with a limiting instruction given immediately after the testimony. *Id.* at 831. The defendant was charged with conspiracy to distribute marijuana and the witness volunteered "We have—I have sold marijuana to him, and he has sold marijuana to me. We have done several drug deals." *Id.* at 731. However, prejudice was otherwise cured through the final jury instructions, in which the district court gave a cautionary instruction for the jury to disregard similar acts made in the past as evidence of propensity to commit the same crime. *Id.* at 832. As to the

statements about the defendant's criminal past that the witness volunteered, the district court "declined to give the jury an admonition because the court believed that such a measure would only highlight the allegedly improper testimony." *Id.* The court continued that "[t]his testimony was simply one of the unexpected developments that occurs in the course of a trial which, as many trial judges and lawyers will attest to, is not an infrequent occurrence." *Id.* (alteration added). "[T]he Supreme Court has repeatedly made clear that a criminal defendant is entitled to 'a fair trial, not a perfect one.'" *Id.* at 832-33 (quoting *Lutwak v. United States*, 344 U.S. 604, 619 (1953)).

Even cases involving multiple comments do not necessarily conjure prejudice sufficient to warrant a new trial. In a multi-defendant case, *United States v. Dale*, the court dealt with the issue of multiple improper comments and concluded that the district court properly denied the defendants' motions for mistrial. 614 F.3d 942, 960-61 (8th Cir. 2010). In *Dale*, a police officer and an informant made two references to gang activity, a police officer referred to seized ammunition as being illegal, an undercover recording used the same name of a defendant (although not referring to the defendant), and informants made "two fleeting references to [a defendant's] illegal activity outside the charged conspiracy. *Id.* at 960-61. The court rejected the assertion that these statements resulted in prejudice. First, the court held that "the prejudicial effect of the two gang references was minimal." *Id.* at 960. The district court then removed any prejudice from the recording by instructing the jury that the name "'DeShawn' did not refer to [the defendant]" and by telling the jury to disregard the statement about ammunition. *Id.* at 960-61. Lastly, the court also found that "the two fleeting references to [the defendant's] illegal activity outside the charged conspiracy . . . did not warrant declaring a mistrial . . . [because] given the wide ranging testimony implicating [the defendant] in the drug conspiracy, we cannot say the two statements amounted to prejudicial error." *Id.* at 961 (alterations added).

The court in *United States v. Sherman*, 440 F.3d 982 (8th Cir. 2006), also found that multiple prejudicial comments were insufficient to warrant a mistrial. The district court had

ruled that testimony involving the defendant previously shooting a man was prejudicial, but "when asked how he knew that [the defendant] carried a gun, [the witness] blurted out he always shot it. He shot a guy in–." *Id.* at 987 (alterations added). The prosecutor interrupted and the court instructed the jury to disregard the testimony. *Id.* Another witness was ordered by the court "not to mention the word 'gang,' the names of any specific gangs, or shootings." *Id.* Despite this warning, the witness stated that he carried a pistol "[b]ecause somebody told me [the defendant] was going to shoot me because I supposed to have broke in his house." *Id.* (second alteration added). This same witness also acknowledged that he assisted in other drug conspiracy cases and "in a murder case that has something to do with this." *Id.* The defense attorney only objected to the second statement, after which the court ordered the jury to disregard the answer. *Id.* In reviewing the district court's denial of several mistrial motions, the Eighth Circuit Court of Appeals held that the disputed testimony was inconsequential because the statements were "fleeting" and "only inferentially might have implicated" the defendant. *Id.* at 988. The court considered that the statements could not be analyzed in isolation from the "context of the entire trial" because there remained "substantial evidence" of the defendant's guilt. *Id.* It concluded by finding that "[w]e are unpersuaded that the disputed testimony . . . , ambiguous as it was and tempered by cautionary instructions, was so egregious as to warrant a conclusion that the district court abused its discretion in refusing to grant a mistrial." *Id.* (alteration added).

Defendant argues that the two separate references to criminal history were prejudicial and incapable of being cured. The Court disagrees. For criminal history, the jury had to make the inference that the defendant had been incarcerated before because Jeffries was a jailhouse informant and his plea agreement was admitted into evidence. The stipulation of one prior felony conviction also suggested prior criminal activity. The defendant argues, however, that the reference to the "gun charge" suggests propensity to commit the charged gun counts. But in *Flores*, the court held that even evidence suggesting propensity to commit a similar crime could be cured with a limiting instruction in the final jury

instructions. 73 F.3d at 832. Indeed, the circumstances here are very similar in that the Court and defense counsel agreed in a sidebar conference, that any contemporaneous admonishment to the jury would put a glaring spotlight on the "gun charge" testimony. *See United States v. Smith*, 487 F.3d 618, 621-22 (8th Cir. 2007) (witness referred to defendant's past incarceration but "this single, non-responsive statement by witness Forbes did not mandate a mistrial."). There is arguably no prejudice because the jury acquitted the defendant of one gun charge and as a result, it was apparent based on the acquittal that the jury was capable of parsing out the evidence and considering only the evidence it was instructed to consider.

As to the correctional officer's reference to seeing the defendant in jail before, the Court immediately told the jury to strike and disregard that fleeting reference to incarceration. *See United States v. Pospisil*, 186 F.3d 1023, 1029 (8th Cir. 1999) (when coupled with a curative instruction, finding no prejudice when a government witness was asked "whether he had visited the defendant 'in prison'"). These statements referring to past incarceration were not prejudicial to the defendant because they were both momentary references, the Court promptly told the jury to disregard the detention officer's statement, and a strict cautionary instruction in the final jury instructions ordered the jurors to disregard evidence of any other criminal convictions other than that stipulated to. *See Wadlington*, 233 F.3d at 1078; *Gundersen*, 195 F.3d at 1037-38.

In a similar fashion, the volunteered statements by the officer about stolen cars does not create prejudice evoking the need for a new trial. The prosecutor stopped the officer mid-sentence and both she and the Court told the jury to disregard the testimony because this was not an instance where the car was stolen. *See 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); *see also United States v. Nicholson*, 116 F. App'x 769, 771 (8th Cir. 2004) (unpublished) (per curiam) (testimony of a police officer

believing vehicle was stolen was not prejudicial because testimony explained officer's interest in the vehicle and government did not seek to prove that vehicle was, in fact, stolen).

Moreover, in the context of the testimony and possible prejudicial impact of the testimony, the Court finds that there was substantial evidence of defendant's guilt on the counts for which he was convicted.[6] *Espinosa*, 585 F.3d at 429 (substantial evidence of a defendant's guilt mitigates concerns about prejudicial or improper testimony). In fact, there was overwhelming evidence of the defendant's guilt. He was arrested with a gun in his possession, police officers found a gun hidden in a vent at his residence, and witnesses testified to seeing the defendant with guns. There were tape recordings of controlled buys, experts testified about the indicia of drug trafficking, and he was arrested with high purity methamphetamine on his person in distribution, not personal use, amounts. Indeed, the jury found him accountable for conspiracy to distribute more than five grams of methamphetamine and possession with intent to distribute more than five grams of methamphetamine.

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[6]*See United States v. Vanover*, 630 F.3d 1108, 1117 (8th Cir. 2011) (quoting *United States v. Claybourne*, 415 F.3d 790, 795 (8th Cir. 2005)) (for felon in possession charge, government must prove "'(1) [the defendant] had previously been convicted of a crime punishable by a term of imprisonment exceeding one year; (2) [the defendant] knowingly possessed a firearm; [and] (3) the firearm was in or . . . affected interstate commerce.'"); *United States v. Betancort-Salazar*, 363 F. App'x 412, 414 (8th Cir. 2010) (sufficient evidence to support drug trafficking convictions because "witnesses testified that [defendant] was the supplier of methamphetamine that was recovered from them, and a search of [defendant's] home revealed distribution amounts of methamphetamine and a cutting agent."); *United States v. Davis*, 471 F.3d 938, 947 (8th Cir. 2006) (elements of a conspiracy include (1) an agreement or understanding to manufacture or distribute a controlled substance; (2) the defendant must have known of the agreement or understanding; and (3) the defendant must have intentionally joined the agreement or understanding); *United States v. Sanchez-Garcia*, 461 F.3d 939, 946 (8th Cir. 2006) (citation omitted) ("To secure a conviction under [18 U.S.C.] § 924(c)(1)(A), the government must present evidence from which a reasonable juror could find a 'nexus' between the defendant's possession of the charged firearm and the drug crime, such that this possession had the effect of 'furthering, advancing or helping forward' the drug crime.").

In conclusion, under either the prosecutorial misconduct standard[7] or the improper testimony standard, the Court finds that the comments made by the witnesses did not result in a miscarriage of justice. *See Campos*, 306 F.3d at 579. There was also "wide ranging testimony implicating" the defendant in the charged crimes. *Dale*, 614 F.3d at 961. The circumstances of the volunteered statements in this case are analogous to those present in *Dale* and *Sherman*, because despite multiple statements, the testimony did not result in prejudice and any suggested prejudice from the testimony was cured by the Court's limiting instructions. The cumulative effect of the testimony did not result in unfairness or deprive defendant of his constitutional rights. *Montgomery*, 635 F.3d at 1099. There was no miscarriage of justice because the Court ameliorated any prejudice from the statements by immediately curtailing the testimony, instructing the jury to disregard the testimony, and using forceful limiting instructions in the final jury instructions. *Sherman*, 440 F.3d at 988; *Campos*, 306 F.3d at 579.

Upon the foregoing,

IT IS ORDERED

That the Defendant's April 11, 2011 Motion for New Trial [Dkt. No. 224] is denied.

DATED this 5th day of May, 2011.

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

[7]In its Mistrial Order, the Court thoroughly and meticulously examined the comments made by the witnesses pursuant to the standard set forth for prosecutorial misconduct (although both parties concede the comments were a result of unexpected testimony, rather than misconduct), and rejected the assertion that the comments were prejudicial to the defendant. The Court can find no reason to alter its analysis or decision in that order, and indeed, the defendant's arguments are largely unchanged for the motion before the Court.