

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

VINDALIN CORNELIUS MONTAGUE,

Defendant-Appellant.

UNPUBLISHED

March 7, 2006

No. 257311

Monroe Circuit Court

LC No. 03-033173-FH

Before: Cooper, P.J., and Jansen and Markey, JJ.

MEMORANDUM.

Defendant appeals as of right from a jury conviction of possession of less than twenty-five grams of cocaine, MCL 333.7403(2)(a)(v). We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant's sole issue on appeal is that the trial court erred in excluding ¶ 4(g) of CJI2d 5.7. We review a claim of instructional error de novo. *People v Hubbard (After Remand)*, 217 Mich App 459, 487; 552 NW2d 493 (1996). We review jury instructions in their entirety to determine if there is error requiring reversal. *People v McFall*, 224 Mich App 403, 412; 569 NW2d 828 (1997). Jury instructions are to be read as a whole rather than extracted piecemeal to establish error, and even if somewhat imperfect, instructions do not create error requiring reversal if they fairly presented the issues to be tried and sufficiently protected the defendant's rights. *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001). If an applicable instruction was not given, the defendant must show that the court's failure to give the requested instruction resulted in a miscarriage of justice. *People v Riddle*, 467 Mich 116, 124; 649 NW2d 30 (2002). "The defendant's conviction will not be reversed unless, after examining the nature of the error in light of the weight and strength of the untainted evidence, it affirmatively appears that it is more probable than not that the error was outcome determinative." *Id.* at 124-125.

Victor Hudson testified that he participated in the crime with defendant. On cross-examination, defendant was permitted to elicit testimony that Hudson was in prison, that he also faced a cocaine possession charge, and that if tried and convicted for his role in this offense, he was subject to sentence enhancement as an habitual offender. Although Hudson was an accomplice rather than an addict-informant, the trial court agreed to give CJI2d 5.7, but omitted ¶ 4(g) because the court found no evidence that Hudson had past criminal convictions admissible for impeachment purposes under MRE 609.

The evidence indicated that Hudson had at least one criminal conviction, and nothing in CJI2d 5.7 suggests that ¶ 4(b) applies only when the witness's "past criminal record" includes a prior offense that qualifies as impeachable pursuant to MRE 609. Because Hudson had a past criminal record and the trial court agreed to give CJI2d 5.7 in light of Hudson's testimony, the court should have included ¶ 4(g) in its reading of CJI2d 5.7 to the jury.

Nevertheless, we conclude that the error was not outcome determinative. First, defense counsel repeatedly argued in closing that Hudson's criminal past indicated that he was not a credible witness. Second, the trial court adequately instructed the jury on assessing witness credibility by reading CJI2d 3.6, which instructs the jury to consider whether a witness has "any special reason to lie." The trial court also read CJI2d 5.6 relating to accomplice testimony, which includes the suggestion that the jury consider whether the accomplice has a criminal record, the same language the court omitted from CJI2d 5.7. "No error results from the absence of an instruction as long as the instructions as a whole cover the substance of the missing instruction." *People v Kurr*, 253 Mich App 317, 327; 654 NW2d 651 (2002).

Affirmed.

/s/ Jessica R. Cooper

/s/ Kathleen Jansen

/s/ Jane E. Markey