

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

UNPUBLISHED

Plaintiff-Appellee,

v

No. 192393

Recorder's Court

JAMES WADDEL,

LC No. 95-008026

Defendant-Appellant.

Before:

PER CURIAM.

Defendant appeals as of right his conviction by jury trial of assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279. We affirm.

Defendant was accused of committing armed robbery by beating a sixty-nine year old man, Willie Cornell, with a stick, throwing a piece of a brick at him, and taking eight dollars from the man's possession. Defendant claimed that he had a dispute with the man over twenty dollars, that he never took any money from the man, that the man attacked him with a knife first and that his actions were in self-defense.

Defendant first argues that the trial court abused its discretion in denying defense counsel's motion to preclude defendant's prior convictions for purposes of impeachment. We disagree. Although the admission of one of defendant's prior convictions may have been error, that error was harmless. A

defendant's credibility may be impeached with prior convictions, MCL 600.2159; MSA 27A.2159, if the convictions satisfy the criteria set forth in MRE 609. *People v Cross*, 202 Mich App 138, 146; 508 NW2d 144 (1993). The admission of defendant's 1987 conviction for entering without breaking was not error because crimes of theft can be probative of credibility and the trial court did not abuse its discretion under MRE 609(a)(2) by ruling that the probative value of the conviction outweighed its prejudicial value. *People v Allen*, 429 Mich 558, 595-596; 420 NW2d 499 (1988) (crimes of theft can be probative of credibility); *People v Bartlett*, 197 Mich App 15, 19-20; 494 NW2d 776 (1992) (breaking and entering can involve theft and therefore be minimally probative of credibility). The admission of defendant's 1983 conviction for receiving and concealing stolen property may have violated the requirement of MRE 609(c) that "[e]vidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from confinement imposed for that conviction, whichever is the later date." Defendant was convicted more than ten years prior to the trial for the current offense, but he was sentenced to three years probation. Neither party has submitted any evidence on appeal to demonstrate when defendant was released from confinement or whether defendant was ever reincarcerated for a violation of his probation. This Court further finds no support for the prosecution's contention that probation constitutes "confinement" under MRE 609(c). The erroneous admission of this conviction, however, was harmless because no reasonable juror would have voted to acquit even if the impeachment evidence had been suppressed. *People v Reed*, 172 Mich App 182, 188; 431 NW2d 431 (1988). Although defendant disputed the version of events that was testified to by Cornell and another prosecution witness, defendant admitted on the record that he intended to "kick [Cornell's] butt" if Cornell did not have his money. It was also undisputed that defendant committed an assault upon

Cornell with a stick and a brick that resulted in injuries to Cornell's face and head. In addition, the possible erroneous admission of the 1983 conviction would have had minimal prejudicial value given the appropriate admission of the 1987 entering without breaking conviction. Therefore, even without the evidence of the 1983 receiving and concealing stolen property conviction, a reasonable juror could not have voted to acquit defendant.

Defendant next argues that the prosecutor committed error requiring reversal by referring to collateral details regarding defendant's prior convictions. We disagree. This alleged error was not preserved and there was no clear error to overcome the failure to preserve the issue. MRE 103(d). After the prosecutor mentioned his conviction for entry without breaking, defendant volunteered that he "had the keys to the house." While it may be impermissible to ask a defendant about the collateral details of a prior conviction, *People v Rappuhn (After Remand)*, 66 Mich App 17, 21; 238 NW2d 400 (1975), the prosecutor should not be held responsible for defendant's unresponsive answer that interjected such collateral details. See *People v Siler*, 171 Mich App 246, 256; 429 NW2d 865 (1988) (a defendant cannot normally obtain a mistrial on the basis of his own improper, unresponsive statements). Also, while it may be impermissible to discuss a defendant's sentencing for a prior conviction, *People v Coffey*, 153 Mich App 311, 313; 395 NW2d 250 (1986), the prosecutor in this case did not question defendant regarding the sentence received for the prior conviction or its conditions. The prosecutor's questions were confined to defendant's apparent use of the name "Wydehl" in the prior court proceeding and to why defendant had never corrected the mistaken name during his multiple court appearances. There was no plain error in these questions and defendant was

not denied a fair and impartial trial on this basis. *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995).

Defendant next argues that the trial court abused its discretion in permitting the introduction of evidence that defendant had used another name in a prior court proceeding. We disagree. The trial court did not abuse its discretion by permitting the admission of evidence concerning defendant's use of the name "Wydell" in a prior court proceeding. Evidence of a defendant's use of an alias has been held to be probative of credibility. *People v Dietrich*, 87 Mich App 116, 139; 274 NW2d 472 (1978), rev'd in part on other grounds 412 Mich 904; 315 NW2d 123 (1982); *People v Messenger*, 221 Mich App 171, 180 (1997). This evidence was of a type that can be properly considered by the jury and this Court will not second guess the trial court's balancing of the probative value and potential prejudicial effect of this testimony. *Cole v Eckstein*, 202 Mich App 111, 113-114; 507 NW2d 792 (1993); *People v Bahoda*, 448 Mich 261, 291; 531 NW2d 659 (1995). The trial court did not abuse its discretion in its evidentiary ruling that this evidence was admissible because there was some probative value regarding credibility and there was minimal prejudicial value because defendant had previously admitted to having prior convictions.

Defendant next argues that the trial court abused its discretion by sentencing defendant to ten to twenty years' imprisonment. We disagree. The trial court did not abuse its discretion in sentencing defendant to ten to twenty years' imprisonment pursuant to the underlying offense and the habitual offender statutory enhancement. *People v Bewersdorf*, 438 Mich 55, 66; 475 NW2d 231 (1991) (whether to impose an increased sentence as authorized by the habitual offender act is discretionary with the sentencing court). The trial court relied on the statutory maximum of ten years for the underlying

felony, MCL 750.84; MSA 28.279, and the enhancement pursuant to the habitual offender statute which doubles the maximum penalty to twenty years, MCL 769.11(1)(a); MSA 28.1083(1)(a). When a habitual offender's underlying felony and criminal history demonstrate that he is unable to conform his conduct to the law, a sentence within the statutory limits is proportionate. *People v Hansford (After Remand)*, ___ Mich ___; ___ NW2d ___ (Docket No.104770, issued 5/13/97) slip op, pp 6-7. The trial court was affected by the seriousness of this crime and defendant's history of two other felony convictions and two misdemeanor convictions. Further, the defendant's background and substance abuse problems do not constitute extraordinary factors requiring leniency. Although defendant's prior convictions were older ones, the habitual offender statutes do not prohibit their use in sentence enhancement. The recommendation of two years probation in the presentence information report apparently did not take defendant's habitual offender status into account and was not binding on the trial court. Further, defendant's claim that the jury's failure to convict defendant of armed robbery indicated that they did not believe Cornell's testimony was unfounded. The prosecutor's argument that the lack of a conviction for armed robbery was due to the lack of a taking, which was probably prevented by the intervention of civilians who came to Cornell's aid, was more consistent with the facts adduced at trial. Therefore, it cannot be said that the trial court abused its discretion by sentencing defendant to ten to twenty years. *People v Milbourn*, 435 Mich 630, 635-636; 461 NW2d 1 (1990) (the trial court abuses its discretion when the sentence imposed is disproportionate to the seriousness of the crime and the defendant's prior record); *People v Gatewood (On Remand)*, 216 Mich App 559, 560; 550 NW2d 265 (1996) (a habitual offender sentence will be reviewed as to whether it violates the principle of proportionality set forth in *Milbourn, supra*).

Affirmed.