STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MONTEZ LEE KENNEDY,

Defendant-Appellant.

UNPUBLISHED
March 20, 1998

No. 198520
Manistee Circuit Court
LC No. 96-002603-FH

Before: Markey, P.J., and Bandstra and Markman, JJ.

PER CURIAM.

Defendant appeals by right his jury trial conviction of assault of a prison employee, MCL 750.197c; MSA 28.394(3), his subsequent bench trial conviction of being a fourth offense habitual offender, MCL 769.12; MSA 28.1084, and his enhanced sentence of five to fifteen years' imprisonment. We affirm defendant's assault of a prison employee conviction, but we vacate defendant's conviction and sentence as an habitual offender, fourth offense, and remand for resentencing.

I

Defendant first contends that the trial court committed error requiring reversal by admitting into evidence for impeachment purposes the prior convictions of defendant and other defense witnesses who saw the altercation between defendant and prison guards. We disagree. "A trial court's decision to admit evidence will not be reversed absent an abuse of discretion." *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995). The prior convictions the prosecutor wished to utilize for impeachment purposes all involved robbery. This Court has previously held that crimes of robbery involve an element of theft constitute prior convictions falling within MRE 609(a)(2) if they satisfy the balancing test set forth in *People v Allen*, 429 Mich 558, 605-606; 420 NW2d 499 (1988), which requires the court to examine the degree of probativeness and prejudice inherent in the admission of the prior conviction. *People v Cross*, 202 Mich App 138, 146; 508 NW2d 144 (1993). If the evidence is more probative than prejudicial, the court does not abuse its discretion to admit the evidence. *Cross, supra* at 146-147.

Michigan Rule of Evidence 609 explains the admissibility standard for prior convictions of witnesses as follows:

> **(a) General rule.** For the purposes of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall not be admitted unless the evidence has been elicited from the witness or established by public record during cross-examination, and,
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> (2) the crime contained an element of theft, and
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> (A) the crime was punishable by imprisonment in excess of one year or death under the law under which the witness was convicted, and
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> (B) the court determines that the evidence has significant probative value on the issue of credibility and, if the witness is the defendant in a criminal trial, the court further determines that the probative value of the evidence outweighs its prejudicial effect.
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> **(b) Determining probative value and prejudicial effect.** For purposes of the probative value determination required by subrule (a)(2)(B), the court shall consider only the age of the conviction and the degree to which a conviction of the crime is indicative of veracity. If a determination of prejudicial effect is required, the court shall consider only the conviction's similarity to the charged offense and the possible effects on the decisional process if admitting the evidence causes the defendant to elect not to testify. The court must articulate, on the record, the analysis of each factor.

A

We first consider the trial court's admission of prior convictions for impeachment of witnesses other than defendant. The instant defense witnesses had been convicted of assault with intent to rob while armed, armed robbery, and unarmed robbery. All of these robbery crimes involve an element of theft. See, e.g., *Cross*, *supra*. All of these robbery crimes also constitute felonies punishable by at least one year imprisonment. With respect to the age factor in determining the probative value of prior convictions, MRE 609(c) only prohibits introduction of evidence of convictions "if a period of more than ten years has elapsed since the date of conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date." The defense witnesses convicted of these robberies were all still imprisoned at the time of defendant's trial, so this prohibition is inapplicable.

Regarding the indication of veracity element in determining the probative value of theft convictions, our Supreme Court has said that crimes containing an element of theft "are more probative of veracity than other crimes." *Allen*, *supra* at 595, judgment held in abeyance *sub nom*, *People v Pedrin*, 430 Mich 1201; 423 NW2d 215 (1988). Thus, because the defense witnesses' recent felony

robbery convictions are probative of veracity, *Allen, supra*, we cannot conclude that the trial court abused its discretion in denying defendant's motion to exclude these convictions.

B

We also conclude that the trial court did not abuse its discretion in ruling that defendant's prior convictions for armed robbery, a felony involving an element of theft, were admissible for impeachment purposes. *Cross, supra*. When faced with the question whether to permit the prosecution to introduce evidence of prior convictions to impeach a defendant who may testify on his own behalf in a criminal case, "the trial judge would exercise his discretion in determining the admissibility of the evidence by examining the degree of probativeness and prejudice inherent in the admission of the prior conviction." *Allen, supra* at 605-606. Considering the probative value of defendant's armed robbery convictions, these convictions not only possessed some probative value regarding veracity, *id*. at 611, but also occurred shortly over a year before defendant's instant assault of a prison employee conviction. To determine the prejudicial effect of prior convictions against which the trial judge must balance their probative value, MRE 609(b) directs that the court consider the similarity of the prior convictions to the charge for which the defendant currently stands trial and "the possible effects on the decisional process if admitting the evidence causes the defendant to elect not to testify."

In the instant case, defendant's prior armed robbery convictions resembled his instant assault charge only to the extent that both crimes primarily involved assault. *Allen*, *supra*. Defendant testified in his own behalf, however, knowing that the prosecutor could impeach him with his prior convictions. Thus, it appears that the prior convictions evidence had very little effect on defendant's decision to testify. We agree with the trial court that defendant's prior convictions had significant probative value given their recency and their element of theft. Although these prior convictions may also have created some prejudice given that they, like the instant assault charge, involved violence, we cannot conclude that the trial court abused its discretion by denying defendant's motion to exclude evidence of his prior convictions.

II

Defendant next argues that the prosecutor's overzealous mischaracterization of defendant's testimony and defense counsel's failure to object to the prosecutor's mischaracterization deprived defendant of due process and his right to a fair trial. We disagree. "An appellate court will reverse in the absence of an objection if a curative instruction could not have eliminated the prejudicial effect of the [prosecutor's] remarks or where failure to review the issue would result in a miscarriage of justice." *People v Messenger*, 221 Mich App 171, 179-180; 561 NW2d 463 (1997). Here, the prosecutor's remarks did not amount to prosecutorial misconduct. Defense counsel questioned defendant on redirect examination regarding whether defendant had seen a nurse for the injuries defendant received in his altercation with corrections officers:

> *Q*: When the prosecutor asked you about a nurse seeing you, is it possible that a nurse could have seen you without your knowledge of it?

A: If she [were] invisible.

Defendant argues that the following statements by the prosecutor during his closing arguments mischaracterized this statement: (1) "And he told you, I never saw a nurse. Do you remember? He said, if I saw one, she had to be invisible"; (2) "And then Mr. Kennedy: They were jumping on me. They weren't restraining me, so I fought back. And I got hurt, but the invisible nurse didn't see anything to report it"; (3) "But I never saw the nurse. She must have been invisible. That's what he said. She must have been invisible." Defendant contends that these statements imply that he claimed an invisible nurse visited him.

Upon our review of the record and the remarks taken in the context of the evidence presented at trial, we believe the first and third alleged mischaracterizations accurately summarize defendant's own contention that only an invisible nurse could have examined him without his knowledge. However, when we consider the prosecutor's statements in light of trial testimony regarding whether the corrections officers had injured defendant and whether a nurse had subsequently visited defendant, we conclude that the prosecutor utilized defendant's statement about the invisible nurse to undermine defendant's credibility. Defendant testified that the corrections officers punched him and that he had suffered a split lip, but that no nurse had examined him or treated his lip. The prison nurse then contradicted defendant's testimony, claiming that she examined defendant after his altercation and discovered no visible injuries.

By referring to the invisible nurse during closing argument, the prosecutor attempted to undermine defendant's credibility by reminding the jury that, in light of the prison nurse's testimony that she examined defendant, his claim that only an invisible nurse could have visited him without his knowledge must have meant that either the prison nurse was invisible or that defendant lied when he said no nurse visited him. Thus, because "[a] prosecutor's comments must be considered in light of defense arguments," *Messenger*, *supra* at 181, and because "[p]rosecutors are accorded great latitude regarding their arguments and conduct . . . [and are] free to argue the evidence and all reasonable inferences from the evidence as it relates to [their] theory of the case," *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995),[1] we conclude that the prosecutor's remarks about the invisible nurse reasonably and appropriately intended to contravene defendant's testimony. The prosecutor's statements could only have prejudiced defendant to the extent that they convinced the jury that defendant had lied about the guards striking him. Therefore, no prosecutorial misconduct occurred, and defendant is not entitled to a new trial.

Based on our conclusion that no prosecutorial misconduct occurred, we also conclude that defendant's ineffective assistance of counsel claim regarding his attorney's failure to object to the prosecutor's remarks is without merit.

III

Finally, defendant argues that the trial court erred in sentencing him as a fourth habitual offender instead of as a second habitual offender when defendant's first three underlying felony convictions all arose from a single criminal transaction. We agree.

"Statutory construction is a question of law that is reviewed de novo." *People v Peña*, 224 Mich App 650, 655; 569 NW2d 871 (1997). The Michigan Supreme Court and this Court have repeatedly recognized that, when promulgating Michigan's habitual offender statutes, MCL 769.10-769.13; MSA 28.1082-28.1085, the Michigan Legislature intended to "provide more severe punishment for a person who declines to change his or her ways following an opportunity to reform." *People v Stewart*, 441 Mich 89, 93; 490 NW2d 327 (1992). Cf. *People v Preuss*, 436 Mich 714, 731-732; 461 NW2d 703 (1990); see also *People v Stoudemire*, 429 Mich 262, 270; 414 NW2d 693 (1987); *People v Derbeck*, 202 Mich App 443, 447; 509 NW2d 534 (1993); *People v Jones*, 171 Mich App 720, 726; 431 NW2d 204 (1988); *People v Curry*, 142 Mich App 724, 732; 371 NW2d 854 (1985). When a prosecutor attempts to use a criminal's multiple prior convictions arising from a single underlying transaction to qualify the criminal for habitual offender status, the Michigan Supreme Court has disapproved:

> [T]he legislative history of the [fourth habitual offender] statute indicates that the Legislature, by using the phrase "after having been three times convicted," intended that the fourth-offender penalties reach only incorrigible criminals who had failed three separate times to reform -- who had been convicted three separate times where the last two convictions were for crimes committed after the prior conviction. The Legislature used the phrase "after having been three times convicted" as shorthand. [*Stoudemire*, *supra* at 266.]
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> [Defendant] had one opportunity to reform before he was charged as a fourth-felony offender. Before the assault in the instant case, [defendant] had been tried and sentenced but once. He could only have been charged as a second offender. To deem [defendant] a fourth-felony offender, subject to the most severe habitual offender penalties, would be contrary to the legislative purpose of applying the fourth-felony offender penalties against only those persons who, after failing three separate opportunities to reform, were deemed incorrigible criminals. [*Id*. at 271.]

In 1994 the Michigan Legislature amended MCL 769.12; MSA 28.1004. Before the 1994 amendment, the statute provided that "[i]f a person has been convicted of 3 or more felonies, attempts to commit felonies, or both . . . ," the defendant qualified as a fourth offense habitual offender. This was the language interpreted in 1987 by the *Stoudemire* court, *supra* at 264. The 1994 amendment changed the wording to: "[i]f a person has been convicted of any combination of 3 or more felonies or attempts to commit felonies . . . ," then that person qualifies as a fourth offense habitual offender. The evidence that the 1994 amendment was nothing more than an attempt to grammatically improve the statute is overwhelming. First, the Legislature did not in any way alter the language of MCL 769.12(1) between the date of the *Stoudemire* decision, 1987, and 1994. The 1994 House and Senate journals regarding House Bill 4782, that included amendments to MCL 769.12(1), and the House Legislative Analysis contain no reference whatsoever of any intention to alter the *Stoudemire* decision. In fact, the purpose for House Bill 4782 was "to create a sentencing commission to develop sentencing guidelines. . . ." Further, in the summary of the bill it is specifically noted that "multiple convictions arising out of a

single transaction would be considered one conviction when sentencing on a conviction arising out of that transaction." Thus, we cannot agree that the 1994 amendment to MCL 769.12(1) in any way changed the holding in *Stoudemire*.

Additionally, the 1990 Michigan Supreme Court decision in *People v Pruess, supra* at 737, also specifically reiterated that "there is sufficient indicia of legislative intent to support the narrow holding in *Stoudemire* that a defendant's prior offenses must arise from separate incidents."

In short, both the Supreme Court and this Court have consistently applied *Stoudemire*'s holding that multiple criminal acts or convictions arising from one underlying criminal transaction may only be counted once for consideration under the habitual offender statutes. See *Stewart*, *supra* at 94; see also *People v Ellis*, 174 Mich App 139, 147; 436 NW2d 383 (1988); *People v Reed*, 172 Mich App 182, 186; 431 NW2d 431 (1988); *Jones*, *supra* at 721-723; *People v Carson*, 115 Mich App 202, 205; 320 NW2d 343 (1982).

In the instant case, the parties did not contest that all of defendant's underlying convictions arose from a single underlying transaction and that defendant underwent a single sentencing procedure for all his prior convictions. Thus, because defendant has not received three separate opportunities to reform as the Legislature contemplated when they promulgated the fourth habitual offender statute, we conclude that the trial court improperly sentenced defendant as a fourth offense habitual offender. *Stoudemire*, *supra.*

The prosecutor relies on the Michigan Legislature's 1994 amendment of MCL 769.12; MSA 28.1084 to argue that the explicit language of the statute commands that a court consider any convictions arising from a single underlying transaction as separate convictions for habitual offender purposes. However, because the Legislature's amendment merely reflects its desire to improve the statute grammatically and because no evidence of an intent by the Legislature to overrule *Stoudemire* appears in the 1994 amendment's legislative history, House Legislative Analysis, HB 4782, June 7, 1993, we decline to adopt this argument.

We affirm defendant's conviction for assault of a prison employee, but vacate defendant's habitual offender, fourth offense conviction and remand for resentencing as a second habitual offender.

Affirmed in part, vacated in part, and remanded for resentencing. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ Richard A. Bandstra
/s/ Stephen J. Markman

[1] *Bahoda, supra,* cites to *People v Duncan*, 402 Mich 1; 260 NW2d 58 (1977), and *People v Gonzalez*, 178 Mich App 526, 535; 444 NW2d 228 (1989).