

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LAWRENCE VAUGHN SAUERMAN,

Defendant-Appellant.

UNPUBLISHED

January 22, 1999

No. 199989

Recorder's Court

LC No. 96-501421

Before: Jansen, P.J., and Holbrook, Jr. and MacKenzie, JJ.

PER CURIAM.

A jury convicted defendant of two counts of third-degree criminal sexual conduct, MCL 750.520d(1)(a); MSA 28.788(4)(1)(a). The trial court sentenced him as a fourth felony habitual offender, MCL 769.12; MSA 28.1084, to 180 to 250 months' imprisonment. Defendant appeals as of right. We affirm.

Defendant first argues that the trial court improperly allowed the prosecution to impeach defendant with his prior breaking and entering convictions pursuant to MRE 609. This Court reviews a trial court's decision to allow impeachment by evidence of a prior conviction for an abuse of discretion. *People v Coleman*, 210 Mich App 1, 6; 532 NW2d 885 (1995). There was no abuse of discretion in this case.

A witness' credibility may be impeached with evidence of prior convictions, but only if the convictions satisfy the criteria set forth in MRE 609. Under MRE 609, if the conviction contains an element of theft, it is admissible if (1) the crime was punishable by more than one year in prison, and (2) the evidence has significant probative value and the probative value of the evidence outweighs its prejudicial effect. *People v Allen*, 429 Mich 558, 605-606; 420 NW2d 499 (1988). Here, the breaking and entering convictions were offenses involving stealth and thus were highly indicative of veracity. They were, however, eight, seven, and five years old, somewhat reducing their probative value. Since breaking and entering is highly dissimilar to CSC III, the crime charged, the prejudicial effect of the evidence is limited. Additionally, the predominate factor, "the effect on the decisional process if the defendant does not testify," *Allen, supra*, p 602, was not implicated here because

defendant took the stand. Indeed, defendant used the jury's knowledge of his prior plea-based convictions to his advantage; he testified that he would have once again pleaded guilty in this case if he had committed the crime. On balance, we are satisfied that the trial court did not abuse its discretion in determining that the probative value of the evidence outweighed its prejudicial effect or in allowing the convictions into evidence for impeachment purposes.

Defendant also argues that several instances of prosecutorial misconduct deprived him of a fair trial. Again, we disagree. Defendant failed to object to the prosecutor's remarks or seek curative instructions at trial. Appellate review is therefore foreclosed unless the prejudicial effect of the remarks was so great that it could not have been cured by an appropriate instruction or a failure to review the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). It would not. Any prejudice resulting from any of the remarks or questions of which defendant complains, including the mention of defendant's prior convictions during closing argument, could have been cured by a cautionary instruction to the jury.

Defendant argues that he is entitled to a new trial because of the cumulative effect of the improper admission of evidence and prosecutorial misconduct. Only actual errors are aggregated to determine their cumulative effect. *People v Bahoda*, 448 Mich 261, 292 n 64; 531 NW2d 659 (1995). Because we have found no errors, there can be no cumulative error. *People v Maleski*, 220 Mich App 518, 525; 560 NW2d 71 (1996).

Finally, defendant argues that he must be resentenced. The claim is without merit. Although the trial judge suggested that defendant had encouraged seven-year-old Justin Fraley to testify falsely, it is apparent from the record that the judge's observation did not factor into the sentence imposed. Rather, the sentence was based on the circumstances of the offense and defendant's criminal history. The court noted that the case involved a sexual assault on a child and that defendant's rehabilitation prospects were poor. The judge also indicated that if defendant were not being sentenced as an habitual offender, she would have sentenced him within the guidelines' recommended range rather than enhancing the sentence. Finally, the sentence did not violate the principle of proportionality. *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990). At age 26, defendant has already spent eight years in jail and this was his fifth felony conviction. As noted by the trial court, defendant has not responded to probation, short-term incarceration, or a mid-length term of incarceration, indicating either an inability or unwillingness to conform his behavior to acceptable norms. In this case, he repeatedly attempted to sexually penetrate a fourteen-year-old babysitter, leaving her with bruises and forcing her to feign an asthma attack to end the assault. Given this offender and this offense, defendant's sentence was not disproportionately harsh or an abuse of discretion. *Id.*

Affirmed.

/s/ Kathleen Jansen
/s/ Donald E. Holbrook, Jr.
/s/ Barbara B. MacKenzie