

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DARRYL K. HAMER,

Defendant-Appellant.

UNPUBLISHED

July 9, 1999

No. 201653

Oakland Circuit Court

LC No. 96-145921 FC

Before: Collins, P.J., and Jansen and White, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of armed robbery, MCL 750.529; MSA 28.797, resisting and obstructing a police officer, MCL 750.479; MSA 28.747, failing to obey a police officer's signal, MCL 750.479a; MSA 28.747(1), and felonious assault, MCL 750.82; MSA 28.277. Defendant was sentenced to five to twenty years' imprisonment for the armed robbery conviction and one to eight years' imprisonment for the resisting a police officer conviction. These sentences were vacated. Defendant was sentenced as an habitual offender, third offense, MCL 769.11; MSA 28.1083, to five to twenty years' imprisonment. In addition, defendant was sentenced to one year of imprisonment for the failing to obey a police officer's signal conviction and two to eight years' imprisonment for the felonious assault conviction. Defendant appeals his convictions as of right. We affirm.

This case arises out of a robbery at a Mobil gasoline station. The prosecution's theory was that defendant committed the robbery. The defense theory was that the station attendant reported the robbery, identifying defendant, a customer at the station, as the perpetrator to cover up his own theft of the money.

Defendant's first argument on appeal is that the court abused its discretion when it allowed defendant's nine-year-old conviction for unarmed robbery to be used as general impeachment evidence. The trial court's decision to allow impeachment by evidence of prior conviction will not be reversed on appeal absent an abuse of discretion. *People v Bartlett*, 197 Mich App 15, 19; 494 NW2d 776 (1992). An abuse of discretion is found only if an unprejudiced person would say that there was no

justification or excuse for the ruling made. *People v Hoffman*, 225 Mich App 103, 104-105; 570 NW2d 146 (1997).

MRE 609 limits the use of evidence of prior convictions for impeachment purposes “to evidence of crimes rationally related to truth-telling disposition.” *People v Jones (On Rehearing After Remand)*, 228 Mich App 191, 200 n 2; 579 NW2d 82 (1998). Because crimes of theft are minimally probative of veracity, they are admissible only if the probative value outweighs the prejudicial effect, as determined under the balancing test of MRE 609(a)(2)(B). *People v Allen*, 429 Mich 558, 595, 606; 420 NW2d 499 (1988); *Bartlett, supra* at 19-20. In determining the probative value of a prior conviction, the court considers only the age of the conviction and the degree to which the conviction indicates veracity. MRE 609(b); *Allen, supra* at 606. With regard to the prejudice determination, the court considers only the similarity of the conviction to the charged offense and the potential effect on the decisional process if admission of the evidence causes the defendant to choose not to testify. MRE 609(b); *Allen, supra*. When there is no similarity between the charged crime and the prior conviction, prejudice is minimal. *People v Daniels*, 192 Mich App 658, 671; 482 NW2d 176 (1991). However, prejudice escalates with increases in the similarity of the crimes and the importance of the defendant’s testimony to the decisional process. *Allen, supra*; *Daniels, supra*.

Defendant’s unarmed robbery conviction was minimally probative of his veracity because it involved a crime of theft and was temporally remote. This minimal probative value did not outweigh the conviction’s prejudicial value. Armed robbery and unarmed robbery are very similar crimes, the only difference being in the use, or not, of a weapon.¹ Furthermore, defendant’s testimony was very important to the decisional process, given that there were no eye-witnesses to the robbery. Therefore, we find that the trial court abused its discretion when it ruled that defendant’s prior conviction for unarmed robbery was admissible as impeachment evidence.

However, because it is highly probable that, given the strength and weight of the untainted evidence, the tainted evidence did not contribute to the verdict, the court’s error was harmless. *People v Bone*, 230 Mich App 699, 703; 584 NW2d 760 (1998). Contrary to defendant’s assertions, this case was not simply a credibility contest between defendant and the station attendant. Defendant admitted that he was in the Mobil station on the night of the robbery. Although he contends that he simply made his purchases and left, when pursued by the police after the station attendant reported the robbery, giving a description of both defendant and his vehicle, defendant refused to stop, even when he knew that at least one of the individuals chasing him was a police officer.² The jury was instructed that evidence of flight can constitute evidence of a guilty state of mind. See CJI2d 4.4; *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995). The amount of money stolen was estimated to be approximately \$240 to \$250. Defendant was found with \$253 in the leg of his sweatpants, including forty-eight one-dollar bills and nineteen five-dollar bills. Although defendant argued at trial that he fled the police because he feared he was being car-jacked and that the cash in his pant-leg was part of the proceeds of his IRS tax refund check, after reviewing the entire record, we are satisfied that it is highly probable that the erroneous admission of defendant’s prior conviction did not affect the verdict.

Defendant next argues that he was denied the effective assistance of counsel at trial because his attorney failed to argue against the admission of defendant’s prior conviction. We disagree. Effective

assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). In order for this Court to reverse due to the ineffective assistance of counsel, defendant must show that his counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced defendant that he was denied the right to a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). To establish prejudice, defendant must show that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Id.* at 314. Defendant must also overcome the presumption that the challenged action might be considered sound trial strategy. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994).

Prior to trial, defense counsel brought a motion regarding prior convictions that he believed could become an issue at trial. Defense counsel stated:

I expect the People would intend to impeach him with the unarmed robbery conviction and quite frankly, I believe because of the fact that it's somewhat similar in nature to the crime charged, that the Court's ruling would be that that would be admissible if the Defendant takes the stand.

As discussed above, however, defendant's prior conviction for unarmed robbery was inadmissible. Counsel erred in assuming that the similarity between the prior conviction and the charged offense was a reason to admit the prior conviction. However, the error did not result in defendant being denied the effective assistance of counsel at trial. The court's written order denying defendant's motion for a new trial indicates that the evidence likely would have been admitted regardless of counsel's arguments. There, the court stressed that, contrary to defendant's arguments, the evidence was admissible because the crimes of armed robbery and unarmed robbery are dissimilar. Furthermore, as discussed above, we find it highly probable that admission of the evidence did not affect the verdict. Thus, defendant has failed to demonstrate that, but for counsel's errors, there was a reasonable probability that the result of trial would have been different.

Defendant's arguments that counsel was ineffective in questioning defendant regarding the prior convictions on direct examination and in failing to object when the prosecutor further questioned defendant about the prior conviction on cross-examination must also fail. Counsel testified at the *Ginther*³ hearing that the reason he questioned defendant regarding the conviction was because he wanted to show the jury that defendant had nothing to hide. If he had allowed the prosecution to bring the point out, counsel feared it would damage defendant's credibility. Given that the court had found the prior conviction to be admissible, defendant has failed to show that such a preemptive strike was not sound trial strategy. Counsel further testified that he did not object to the prosecution's questions because he felt as though defendant was handling himself well on the stand and actually working the questions to his benefit. Again, defendant has failed to show that counsel's failure to object was not sound trial strategy.

Affirmed.

/s/ Jeffrey G. Collins

/s/ Kathleen Jansen

/s/ Helene N. White

¹ “The elements of armed robbery are: (1) an assault, (2) a felonious taking of property from the victim’s person or presence, and (3) the defendant must be armed with a weapon described in the statute.” *People v Johnson*, 215 Mich App 658, 671; 547 NW2d 65 (1996). “The elements of unarmed robbery are: (1) a felonious taking of property from another, (2) by force or violence or assault or putting in fear, and (3) being unarmed.” *People v Johnson*, 206 Mich App 122, 125-126; 520 NW2d 672 (1994).

² One of the vehicles pursuing defendant was an unmarked police vehicle carrying two officers in plain clothes. However, defendant acknowledged that the other was a marked vehicle carrying a uniformed police officer.

³ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).