

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BENJAMIN HORTON,

Defendant-Appellant.

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UNPUBLISHED

May 8, 2001

No. 220091

Livingston Circuit Court

LC No. 220091

Before: Murphy, P.J., and Griffin and Wilder, JJ.

GRIFFIN, J. (*dissenting*).

I respectfully dissent on the basis that the trial court committed error requiring reversal by overruling defendant's objection to the admission of defendant's eighteen-year-old conviction of larceny from a person. I agree with and join the majority's analysis and disposition of defendant's other issues.

Prior to trial, defendant filed a written motion in limine to exclude from evidence his 1981 conviction of larceny from a person.<sup>1</sup> At a hearing held April 22, 1999, the trial court ruled that defendant's 1981 conviction was admissible for purposes of impeachment because the prior conviction was "dissimilar from the offense charged in this case [breaking and entering a building with intent to commit larceny, MCL 750.110; MSA 28.305]" and "the prejudicial effect does not outweigh the probative value of this case."<sup>2</sup> A written order consistent with the court's oral ruling was entered on April 27, 1999.

At trial, defendant testified on his own behalf. For strategic purposes, defense counsel first questioned defendant regarding defendant's 1981 conviction of larceny from a person.<sup>3</sup>

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<sup>1</sup> Defendant's motion also sought to exclude from evidence his 1974 convictions of unarmed robbery and attempted larceny in a building. The prosecutor did not object to exclusion of the 1974 convictions and evidence of such convictions was not introduced at trial.

<sup>2</sup> Under MRE 609(a)(2)(B), the correct balancing test for admissibility is whether "the probative value of the evidence outweighs its prejudicial effect."

<sup>3</sup> Because the trial court's erroneous ruling precipitated this strategic decision, this issue is not waived. *People v Blackburn*, 135 Mich App 509, 514; 354 NW2d 807 (1984).

Later on cross-examination, the prosecution emphasized defendant's conviction and introduced the fact that defendant had been only recently released from prison:

*Q.* Mr. Horton, you have been convicted of larceny from a person, correct?

*A.* Yes, I have.

*Q.* And you were released from incarceration from that sentence in 1998, is that correct?

*A.* Yes--

*Mr. Olson (attorney for the defense):* Objection, Judge. I don't think it's proper under 609.

*Ms. Maas (assistant prosecutor):* Under 609 I have to establish that it was within ten years or that he was released from incarceration within ten years and that's what I wanted to confirm.

*Mr. Olson:* That's a matter of law, Judge. You've already ruled on that.

*The Court:* Overruled.

In her closing argument, the assistant prosecuting attorney argued that the jury should not believe defendant because he was a "convicted thief:"

And you have to consider the source too. One thing that you're going to be able to consider, ladies and gentlemen is basically the defendant as a convicted thief. And what comes down to is who you're going to believe in this case, ladies and gentlemen are you going to believe the words of police officers who have brought to you evidence which corroborates each and every step of the investigation that they took or are you going to believe the word of a convicted thief.

Contemporaneously, with its decision in *People v Allen*, 429 Mich 558; 420 NW2d 499 (1988), the Michigan Supreme Court amended MRE 609. MRE 609 now read in pertinent part as follows:

(a) General rule. For the purpose 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

(1) the crime contained an element of dishonesty or false statement, or

(2) the crime contained an element of theft, and

(A) the crime was punishable by imprisonment in excess of one year or death under the law under which the witness was convicted, and

(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.

(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.

(c) *Time limit.* Evidence 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 the confinement imposed for that conviction, whichever is the later date.

609: In *Allen*, *supra* at 605-606, our Supreme Court explained the operation of amended MRE

In sum, the trial judge's first task, under the amended MRE 609, will be to determine whether the crime contains elements of dishonest or false statement. If so, it would be admitted without further consideration. If not, then the judge must determine whether the crime contains an element of theft. If it is not a theft crime, then it is to be excluded from evidence without further consideration. If it is a theft crime and it is punishable by more than one year's imprisonment, 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. For purposes of the probativeness side of the equation, only an objective analysis of the degree to which the crime is indicative of veracity and the vintage of the conviction would be considered, not either party's need for the evidence. For purposes of the prejudice factor, only the similarity to the charged offense and the importance of the defendant's testimony to the decisional process would be considered. The prejudice factor would, of course, escalate with increased similarity and increased importance of the testimony to the decisional process. Finally, unless the probativeness outweighs the prejudice, the prior conviction would be inadmissible.

I find instructive *People v Pedrin*, 429 Mich 558; 420 NW2d 499 (1988), a case that was consolidated with *Allen*, *supra*. At defendant Pedrin's 1982 trial for breaking and entering an unoccupied building with intent to drive away an automobile, the prosecutor introduced, for impeachment purposes, defendant's 1981 conviction of breaking and entering with intent to

commit larceny. In reversing and remanding for a new trial, the Supreme Court held that a theft crime like breaking and entering with intent to commit larceny is only “moderately probative of veracity,” yet heavily prejudicial, because “[t]he charged offense was very similar to the prior conviction.” *Id.* at 610-611.

In the present case, defendant’s prior conviction was even less probative and more prejudicial than *Pedrin, supra*. Defendant’s conviction was eighteen years’ old, not one year old, and therefore less an indicator of defendant’s veracity. Further, the potential prejudice was high in view of the similarity of the prior conviction and present charge. On this issue of similarity, the prosecutor confesses error: “The People would concede that . . . despite the court’s finding that the two were dissimilar, the similarities between larceny from a person and breaking and entering a building with intent to commit a larceny appear high.”

After balancing the low probative value of the theft conviction with its high prejudicial effect, I would hold that the trial court abused its discretion by overruling defendant’s objection to the admission of the eighteen-year-old conviction. *People v Hicks*, 185 Mich App 107, 110; 460 NW2d 569 (1990).

In regard to harmless error, I note that the prejudice to defendant was substantial. Such prejudice included the jury learning that defendant had only recently been released from prison for his prior larceny conviction and the prosecutor’s argument that defendant could not be believed because he was a “convicted thief.” In light of the substantial prejudice and because the prosecution’s case against defendant was based entirely on circumstantial and somewhat contradictory evidence, I would hold that defendant has sustained his burden of demonstrating that it is “more probably than not” that the erroneously admitted evidence affected the jury’s verdict. *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999). I would reverse and remand for a new trial.

/s/ Richard Allen Griffin