

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DONALD LEE HUTCHINS,

Defendant-Appellant.

UNPUBLISHED

October 23, 2001

No. 222125

Mason Circuit Court

LC No. 91-010285-FH

Before: Neff, P.J., and Doctoroff and Wilder, JJ.

PER CURIAM.

Defendant was convicted by jury of larceny over \$100, MCL 750.356, arising out of the theft of copper railroad wire. Defendant was sentenced to one year in prison and appeals as of right. We affirm.

Defendant's sole issue on appeal is that he was denied a fair trial because of unfair prejudice caused when a prosecutorial witness revealed that defendant had a prior conviction. Defendant argues this testimony should have been excluded under MRE 404(b) and MRE 609. He further claims that the court's cautionary instruction, instead of alleviating prejudice caused by the testimony, actually magnified the prejudice by verifying for the jury that defendant had a prior conviction. Defendant claims this testimony severely undermined his credibility, depriving him the right to a fair trial.

Before trial began in this matter, defendant moved the court under MRE 609 to preclude the prosecution from impeaching defendant's testimony at trial with evidence of his prior convictions. The court denied this motion. At trial, a prosecution witness testified regarding defendant's parole officer, however, defense counsel did not object. Instead, he requested a sidebar. At the conclusion of the sidebar, the court gave a cautionary instruction to the jury, and both defense counsel and the prosecutor affirmatively agreed the court gave the instruction correctly.

The testimony regarding defendant's parole officer was not introduced as impeachment evidence to challenge defendant's credibility under MRE 609. Instead, the witness was relating a statement that defendant allegedly made regarding his whereabouts at the time the stolen wire was sold. Therefore, defendant should have objected under MRE 403 or MRE 404(b). See *People v Taylor*, 422 Mich 407, 414-415; 373 NW2d 579, 582 (1985) (describing the difference

between use of prior convictions under MRE 609 and MRE 401). An objection based on one ground is insufficient to preserve an appellate attack on another ground. *People v Maleski*, 220 Mich App 518, 523; 560 NW2d 71 (1996). Because defendant failed to object to evidence of prior convictions offered for a purpose other than impeachment, the issue was not properly preserved for appeal.

Where no objection was raised at trial to the admission of testimony, the alleged erroneous admission of the testimony is normally reviewed for plain error. *People v Carines*, 460 Mich 750, 763-764; 597 NW 2d 130 (1999). However, in this case, defendant went beyond failing to object to the admission of the testimony and affirmatively accepted the court's cautionary instruction regarding the testimony.

Waiver is the "intentional relinquishment or abandonment of a known right," whereas forfeiture is the "failure to make the timely assertion of a right." *People v Carter*, 462 Mich 206, 215; 612 NW2d 144, 149 (2000), quoting *Carines, supra* at 762-763 n 7, quoting *United States v Olano*, 507 US 725, 733; 113 S Ct 1770; 123 L Ed 2d 508 (1993). A waiver of certain rights precludes appellate review of those rights because the waiver extinguishes any error. *Carter, supra* at 215-216.

In this case, defense counsel did not object to the testimony, asking only for a sidebar conference, which was not on the record. Following the sidebar, the court gave a cautionary instruction that directly addressed the concern that the jury might interpret defendant as a bad person because he had a parole officer. After instructing the jury, the court asked both attorneys if they approved of the instruction as given, and defense counsel expressly stated that the instruction was given correctly and made no objection on the record. Because defense counsel affirmatively approved the court's cautionary instruction, the issue of the prejudicial nature of the witness' testimony was waived and cannot be raised on appeal because the approval extinguished any error. *Carter, supra* at 215-216.

Affirmed.

/s/ Janet T. Neff
/s/ Martin M. Doctoroff
/s/ Kurtis T. Wilder