

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

APOLLO D. WADE,

Defendant-Appellant.

UNPUBLISHED

June 3, 2004

No. 247208

Wayne Circuit Court

LC No. 02-010252

Before: Schuette, P.J., and Bandstra and Cooper, JJ.

SCHUETTE, P.J. (*concurring*).

I concur with my colleagues' conclusion that defendant's conviction should be affirmed. However, I disagree with the majority's analysis of the impeachment evidence issue. The majority holds that the trial court abused its discretion in allowing defendant's 1994 conviction for receiving and concealing stolen property, MCL 750.535, to be used to impeach his credibility as a witness, but that this constituted harmless error. I disagree and would find that the admission of this impeachment evidence was proper and was not an abuse of discretion.

An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling made, *People v Snider*, 239 Mich App 393, 419; 608 NW2d 502 (2000), or the result is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias, *People v Hine*, 467 Mich 242, 250; 650 NW2d 659 (2002).

As a theft offense, the crime of receiving and concealing stolen property is moderately indicative of veracity, and thus has moderate probative value. *People v Allen*, 429 Mich 558, 595; 420 NW2d 499 (1988). The majority comments that defendant was convicted of receiving and concealing stolen property eight years before his trial and concludes that therefore, his conviction has only minimal probative value. However, I would note that while the age of defendant's prior conviction might make it less probative of honesty, it reasonably follows that the age of the prior conviction would also make it less potentially prejudicial as a stain on defendant's character.

Furthermore, as the majority notes, receiving and concealing stolen property, MCL 750.535, is classified under the "stolen, embezzled or converted property" section of the Michigan Penal Code, and is categorized as a crime against property in the Michigan Sentencing

Guidelines Act, MCL 777.16z. On the contrary, armed robbery, MCL 750.529, and carjacking, MCL 750.529a, are classified under the “robbery” section of the Michigan Penal Code, and are categorized as crimes against persons in the Michigan Sentencing Guidelines Act, MCL 777.16y. Defendant’s prior conviction involved receiving and concealing a stolen automobile, even though both the past and present crimes involved an automobile, I would respectfully disagree with the majority’s conclusion that these crimes are so similar as to render the admission of the prior conviction more prejudicial than probative. In receiving stolen goods, defendant was a passive actor, whereas in the present case, defendant’s actions were assaultive and put others at risk of physical harm. I would find that there is sufficient disparity between the two offenses to diminish the prejudicial effect of the prior conviction. I would not find the trial court’s determination that these crimes were sufficiently different to be palpably and grossly violative of fact and logic. *Hine*, supra at 250. Additionally, there is no indication that the admission of defendant’s conviction had a chilling effect on his decision to testify. *People v Coleman*, 210 Mich App 1, 6; 532 NW2d 885 (1995).

Finally, the trial court instructed the jurors,

There is evidence that the defendant has been convicted of a crime in the past, you may consider this evidence only in deciding whether you believe that the defendant is a truthful witness. You must not use it for any other purpose. A past conviction is not evidence that the defendant committed the alleged crime in this case.

“It is well established that jurors are presumed to follow their instructions.” *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Thus, I would not say that the trial court’s decision to allow the evidence was without justification or excuse, as necessary to find an abuse of discretion. *Snider*, supra, at 419.

/s/ Bill Schuette