

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROOSEVELT THEODORE WATTS, JR.,

Defendant-Appellant.

UNPUBLISHED

March 25, 2008

No. 272369

Wayne Circuit Court

LC No. 06-004272-01

Before: Schuette, P.J., and Borrello and Gleicher, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of first-degree murder, MCL 750.316, possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, and felon in possession of a firearm, MCL 750.224f. He was sentenced to concurrent terms of life for the murder conviction and 38 to 60 months for the felon in possession conviction and a consecutive term of five years for the felony-firearm conviction. For the reasons set forth in this opinion, we reverse defendant's convictions.

This case arises from the shooting death of a 15-year-old victim who at the time of the shooting was selling crack cocaine from a house where the defendant had been smoking crack. The victim died of a gunshot wound to the right lower chest. The three inhabitants of the house, two of whom also had also been smoking crack, testified that they did not see the shooter but that defendant was the only other person present in the home. Defendant was arrested hours after the shooting and gave a statement that he was leaving the house when a masked man entered and shot the victim. Defendant stated that he was close to the shooter when the gun was discharged. Defendant tested positive for gunshot residue on his face and hand, and when he was arrested, a package of crack cocaine was found in the back seat of the car where he had been a passenger. Defendant stipulated that he had a felony conviction for purposes of the felon-in-possession charge. Defendant testified consistently with his statement to police. On cross-examination, the prosecutor questioned defendant about his prior armed robbery conviction. Defense counsel objected, and a side bar was held outside the hearing of the court recorder. No ruling was made on the record, but the prosecutor continued to ask defendant about his armed robbery conviction.

On appeal, defendant first argues that the trial court abused its discretion in admitting evidence of his prior conviction for armed robbery. We find that the issue is preserved because defendant's counsel objected and the trial court clearly allowed the prosecution to question

defendant about his conviction. We also find that the trial court erred by failing to make its ruling on the record.

MRE 609 allows the use of prior theft convictions to impeach the credibility of a defendant in a criminal trial. However, the trial court is required to make a determination *on the record* that the evidence has a “significant probative value on the issue of credibility” and that the probative value of the evidence outweighs the prejudicial effect. MRE 609. In *People v McDaniel*, 256 Mich App 165, 168; 662 NW2d 101 (2003), this Court found that the trial court committed error by failing to articulate its findings regarding the admissibility of the defendant’s prior conviction on the record. The trial court in this matter also erred in failing to make its determination on the record.

This error is a preserved, non-constitutional error subject to a harmless error analysis. *Id.* This Court must therefore determine whether defendant established that it was more probable than not that the error affected the outcome of the proceedings and resulted in a miscarriage of justice. *People v Young*, 472 Mich 130, 141-142; 693 NW2d 801 (2005); *People v Lukity*, 460 Mich 484, 494-496; 596 NW2d 607 (1999). The error is problematic because defendant’s credibility was extremely important to his defense and because the prior armed robbery conviction was similar to the murder/robbery scenario the prosecutor argued occurred here. The error is further compounded by the fact that we are devoid of a record pursuant to MRE 609 to ascertain from the trial court its rationale for admitting the evidence.

Although defendant stipulated that he had a prior felony conviction for purposes of the felon in possession charge, an armed robbery conviction is more damaging to credibility than an unknown felony conviction. If it were not, MRE 609 would not differentiate between crimes of theft and crimes of dishonesty and other felony convictions, which are not admissible. Credibility was a significant issue in this case where two of the witnesses against defendant admitted to using crack cocaine on the night of the shooting and one of these witnesses was a prostitute. The testimony of the inhabitants of the crack house, who had been using crack, was not extremely credible. This factor is complicated even further by the fact that the witnesses did not actually see the shooting. While the prosecution argues that the physical evidence of the gunshot residue is conclusive evidence of guilt, its presence is explained by defendant’s version of events, in which he was standing next to the shooter when the gun was fired and then escaped. That the shooter would allow defendant to escape is not unbelievable where defendant could not identify the shooter because of the mask and where the shooter likely wanted to approach the victim to obtain money and drugs. However, because the credibility issue could have gone for or against defendant even without the jury’s knowledge of defendant’s prior conviction, defendant did not establish, solely based on credibility, that it was more probable than not the error affected the outcome of the proceedings.

The other factor to be considered was the similarity between the crimes. Defendant’s prior conviction was for armed robbery, and the prosecutor asked him about the armed robbery three times. It seems likely from the evidence presented that the motive for killing the victim was robbery. The victim carried his money and drugs on his person, likely had both money and drugs immediately before the shooting, and were without either at the hospital. Although defendant was not charged with armed robbery in this matter, the evidence indicates that the crime that occurred was armed robbery and murder.

The combination of the prejudice to defendant and its direct impact on his credibility coupled with the similarity between the two crimes more probably than not affected the outcome of the proceedings, thus resulting in a miscarriage of justice. Defendant is not required to show that it was highly probable that a miscarriage of justice occurred, only that it is more probable than not. *Lukity, supra* at 495. In examining the combination of prejudices discussed above, we find that it is more probable than not that a miscarriage of justice occurred.

In *McDaniel, supra*, this Court stated:

A witness's credibility may be impeached with prior convictions, MCL 600.2159, but only if the convictions satisfy the criteria set forth in MRE 609, which require a determination 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 the prejudicial effect." MRE 609; *People v Nelson*, 234 Mich App 454, 460; appeal denied, 461 Mich 919, 605 NW2d 316 (1999).

Notwithstanding the lower court's evident familiarity with the MRE 609 analysis, the court committed error by failing to articulate its findings on the record. However, this, without more, does not require reversal where it appears from the record that the court was aware of its discretion and the factors relevant to the exercise of that discretion. *People v Bell*, 155 Mich App 408, 411; 399 NW2d 542 (1986); *People v Eggleston*, 148 Mich App 494, 502-503; 384 NW2d 811 (1986).

Moreover, even if the trial court committed error in failing to articulate its specific MRE 609 analysis, or in admitting the prior convictions, the error was harmless and does not require reversal because defendant has not demonstrated prejudice. *People v Mateo*, 453 Mich 203, 210, 212; 551 NW2d 891 (1996); *Allen, supra* at 612. Whether a preserved nonconstitutional error is harmless depends on the nature of the error and its effect on the reliability of the verdict in light of the weight of the untainted evidence. *People v Whittaker*, 465 Mich. 422, 427; 635 N.W.2d 687 (2001). The error is presumed harmless, and the defendant bears the burden of showing that the error resulted in a miscarriage of justice. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999); *People v Lukity*, 460 Mich 484, 493-494; 596 NW2d 607 (1999). *Id.* at 165-167. (Footnotes omitted).

Unlike this Court's holding in *McDaniel*, we cannot find that there was sufficient evidence establishing defendant's guilt independent of the error. Therefore, we hold that the admission of defendant's prior conviction was not harmless error and defendant's convictions are reversed.

Because we reverse on this issue, we do not need to address defendant's remaining issue.

Reversed.

/s/ Stephen L. Borrello
/s/ Elizabeth L. Gleicher