

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROOSEVELT THEODORE WATTS, JR.,

Defendant-Appellant.

UNPUBLISHED

October 15, 2009

No. 272369

Wayne Circuit Court

LC No. 06-004272-01

AFTER REMAND

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

PER CURIAM.

Defendant appealed 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. We previously ruled that the trial court failed to make a determination on the record regarding the probative value of evidence of defendant's prior armed robbery conviction and whether the probative value of the evidence outweighed the prejudicial effect, concluded that this error was not harmless, and reversed defendant's conviction.¹ Thereafter, we denied the prosecutor's motion for reconsideration.² The prosecutor then sought leave to appeal in our Supreme Court; in lieu of granting leave, our Supreme Court vacated our judgment and remanded the matter to this Court, concluding that "[r]eversal of the defendant's convictions is not the proper remedy for the trial court's failure to articulate its reasons for admitting a prior conviction for impeachment on the record"³ In addition, our Supreme Court ordered this Court to "remand this case to the Wayne Circuit Court with directions to make a record of its decision to permit impeachment of the defendant with an armed robbery conviction." In compliance with our Supreme Court's order, we issued an order remanding the matter to the trial court and retaining jurisdiction over

¹ *People v Watts*, unpublished opinion per curiam of the Court of Appeals, issued March 25, 2008 (Docket No. 272369) (Schuette, J., dissenting).

² *People v Watts*, unpublished order of the Court of Appeals, entered May 2, 2008 (Docket No. 272369).

³ *People v Watts*, 482 Mich 980; 755 NW2d 188 (2008).

the matter.⁴ The trial court issued a written opinion regarding its findings and ruled that evidence of defendant's prior armed robbery conviction was properly admitted as impeachment evidence under MRE 609. For the reasons set forth in this opinion, we affirm.

We outlined the facts of this case in our previous opinion:

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 [sic] 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. [*People v Watts*, unpublished opinion per curiam of the Court of Appeals, issued March 25, 2008 (Docket No. 272369) (Schuette, J., dissenting), slip op at 1.]

I. Trial Court's Opinion On Remand

In concluding on remand that evidence of defendant's prior armed robbery conviction was properly admitted, the trial court first considered whether the age of defendant's armed robbery conviction precluded its admission under MRE 609(c). Although defendant was convicted in 1992, the trial court concluded that the evidence was not inadmissible on this basis because defendant did not establish that more than ten years had passed since he was released from the confinement imposed for the conviction, and because the conviction was not devoid of probative value:

As to the age of the armed robbery conviction, the conviction took place in 1992 and the alleged offense in the instant case took place in 2006. Although almost 14 years had passed since defendant's conviction for armed robbery, MRE 609(c) prohibits a witness from being impeached with a conviction if more than 10 years have passed from the date of the conviction or from the date the witness was released from the confinement imposed for the conviction. Defendant did not

⁴ *People v Watts*, unpublished order of the Court of Appeals, entered October 29, 2008 (Docket No. 272369).

establish that more than 10 years had passed since he was released from confinement for the armed robbery conviction. Thus, the prosecution was not prohibited on that basis from impeaching defendant with the armed robbery conviction. Further, although a significant amount of time had passed since the conviction itself, it was not so remote as to have no probative value.

The trial court next weighed the probative value of the evidence against its prejudicial effect and concluded that the armed robbery conviction was relevant to the question of defendant's credibility and not unfairly prejudicial:

The Court also finds that the armed robbery conviction was probative of defendant's veracity. With regard to armed robbery, the Court of Appeals has stated that it "contains an element of theft and it is our view that a person who is willing to deprive others of their property is likely to be a person who does not tell the truth." [*People v*] *Minor*, [170 Mich App 731, 736; 429 NW2d 229 (1988)]. Credibility was an important issue in this case, where there were no eyewitnesses to the shooting, witnesses testified that defendant was the only other person in the home when the shooting occurred, and defendant claimed that an unknown, masked gunman was the shooter. The armed robbery conviction went to defendant's ability to testify truthfully about his role in the shooting.

On the issue of prejudice, the Court finds that the armed robbery conviction was not so similar to the charged offense of first-degree premeditated murder as to be unduly prejudicial. The Court notes that admission of the conviction was somewhat prejudicial to the defendant because the prosecution's underlying theory was that defendant's ultimate goal in shooting the victim was to obtain more drugs. However, in the instant case, defendant was not charged with armed robbery, but first-degree premeditated murder. The dissimilarity between armed robbery and first-degree premeditated murder reduces the prejudicial effect. See *People v Daniels*, 192 Mich App 658, 671; 482 NW2d 176 (199[2]) (finding that the prejudice is minimal because there is no similarity between murder and armed robbery). The Court finds that there was not a high risk that the jury would convict defendant of murder because it knew he was convicted of armed robbery 16 years earlier.

Lastly, the trial court determined that the importance of defendant's testimony to the decisional process did not militate for or against admission of the evidence:

Finally, this Court must determine the importance of defendant's testimony to the decisional process. The Court finds that this factor is evenly balanced and does not lean one way or the other toward either exclusion or admission of the evidence. As previously noted, there were no eyewitnesses to the shooting, so no witness could testify definitively that defendant shot the victim. Further, defendant's testimony in this case was not crucial because defense counsel was able to attack the credibility of and effectively impeach the witnesses against defendant with their prior inconsistent statements regarding the events leading up to and after the shooting.

The trial court summarized its reasoning:

In conclusion, an analysis of the factors that this Court was required to evaluate in determining whether to admit the impeachment evidence results in three factors favoring admission and one factor being neutral. On this basis, the Court concludes that the probative value of the armed robbery conviction outweighed any resulting prejudice, and that evidence of defendant's armed robbery conviction was properly admitted as impeachment evidence under MRE 609.

II. Analysis

A. Admissibility of Defendant's Prior Conviction under MRE 609

Defendant argues that the trial court abused its discretion in allowing the prosecutor to impeach him with evidence of his prior armed robbery conviction. "This Court reviews for an abuse of discretion a trial court's determination whether a prior conviction involving a theft component may be used to impeach a defendant." *People v Meshell*, 265 Mich App 616, 634; 696 NW2d 754 (2005). An abuse of discretion occurs only when the trial court's decision falls outside the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). A trial court abuses its discretion when it admits evidence that is inadmissible as matter of law. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). "[A] trial court's decision on a close evidentiary question ordinarily cannot be an abuse of discretion." *People v Hine*, 467 Mich 242, 250; 650 NW2d 659 (2002).

MRE 609 permits the impeachment of a witness's credibility with evidence of a prior conviction if certain criteria are satisfied. The court rule provides in pertinent part:

(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

* * *

(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.

"In determining whether evidence is probative, the questions to be asked relate to the degree to which the crime in question is indicative of veracity and the vintage of the prior conviction." *People v Minor*, 170 Mich App 731, 735; 429 NW2d 229 (1988). The armed robbery conviction was probative of defendant's veracity. Although armed robbery contains an element of theft, it is primarily an assaultive crime; therefore, it has less probative value on the issue of credibility than other theft crimes. *People v Daniels*, 192 Mich App 658, 671; 482 NW2d 176 (1992). However, armed robbery is "minimally probative of defendant's credibility[.]" and evidence of a prior armed robbery conviction is "properly admissible if the probative value outweighs the prejudicial effect." *Meshell, supra* at 636. Although defendant's prior armed robbery conviction satisfies the time limit in MRE 609(c), the age or vintage of the prior conviction reduced its probative value. However, we agree with the trial court that "it was not so remote as to have no probative value."

In sum, we conclude that both elements in the "probative" analysis favor admissibility of defendant's prior armed robbery conviction. Although the age of the prior conviction reduced its probative value, it retained some probative value. Furthermore, armed robbery, albeit primarily an assaultive crime, contains an element of theft. Thus, we conclude that defendant's armed robbery conviction is at least somewhat probative of his credibility.

"On the issue of prejudice we are required to review the issues of whether the proposed conviction sought to be admitted in evidence is similar to the charged offense and the importance of the defendant's testimony to the decisional process." *Minor, supra* at 736. In this case, defendant was not charged with armed robbery, so the similarity of the armed robbery conviction to the *charged offense* does not favor admissibility. See *Daniels, supra* at 671 ("there is no similarity between murder and armed robbery"). However, as defendant argues, the prosecutor theorized that defendant killed the victim in order to rob him of his money and drugs. In this sense, then, defendant's prior armed robbery conviction was similar not to the charged offense, but to the prosecutor's theory at trial of the offenses committed by defendant. Arguably, then, this element of the "prejudice" analysis favors admissibility. On the other hand, the concern with prior conviction evidence, that a defendant will be convicted simply because of his bad character, is arguably lessened in this case because the trial court instructed the jury that defendant's prior "conviction is not evidence that the defendant committed the alleged crime in this case" and that it could consider the evidence of defendant's prior conviction only with respect to defendant's truthfulness. Although the effectiveness of limiting instructions regarding prior convictions is questionable, *People v Allen*, 429 Mich 558, 571-581; 420 NW2d 499 (1988), we note that "jurors are presumed to follow their instructions." *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

While the first element of the "prejudice" analysis arguably favors inadmissibility, the second element of the "prejudice" analysis, the effect of admitting such evidence on the defendant's decision to testify, favors admission of the evidence. Admission of the evidence had no bearing on defendant's decision to testify and did not cause defendant not to testify. *Daniels*,

supra at 671. Because defendant testified at trial, this case does not implicate concerns regarding the effect on the decisional process if defendant decides not to testify because of fear of impeachment by prior convictions.

Because of the age of defendant's prior conviction, and the similarity of the prior conviction, not to any charged offense, but to the prosecutor's theory at trial, this case presents a close question regarding the admissibility of defendant's prior armed robbery conviction. Ultimately, however, we conclude that both elements of the "probative" analysis favor admitting the evidence, albeit only minimally. We further conclude that the element of the "prejudice" analysis regarding defendant's decision to testify also favors admissibility. Only the similarity element of the "prejudice" analysis arguably favors inadmissibility. As stated previously, a trial court's decision on a close evidentiary question generally cannot be an abuse of discretion. *Hine*, *supra* at 250. After carefully reviewing the trial court's decision, made on remand, regarding the admissibility of defendant's prior armed robbery conviction for impeachment purposes, we cannot conclude that the trial court's decision is outside the range of reasonable and principled outcomes. *Maldonado*, *supra* at 388.

B. Sufficiency of the Evidence

Defendant claims there was insufficient evidence to support his conviction. This Court reviews claims of insufficient evidence de novo. *People v Cline*, 276 Mich App 634, 642; 741 NW2d 563 (2007). This Court reviews a challenge to the sufficiency of the evidence by viewing the evidence in a light most favorable to the prosecution, and determining whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *Id.*

The only element of the crimes that defendant challenges is his identity as the shooter. Identity is always an essential element of any crime. *People v Oliphant*, 399 Mich 472, 489; 250 NW2d 443 (1976). Viewing the evidence in a light most favorable to the prosecution, there was sufficient evidence that defendant shot the victim. Witness testimony can provide sufficient evidence to justify a conviction. See *People v Malone*, 193 Mich App 366, 372; 483 NW2d 470 (1992), *aff'd* 445 Mich 369 (1994). In this case, defendant admitted he was present at the time of the shooting. Tracy Turner, who was present in the home when the victim was shot, testified that after she heard the gunshot, a man wearing a blue coat like defendant's coat lifted the victim from the doorway of her bedroom. Turner recognized defendant's voice telling her to keep her head down. Defendant had gunshot residue on his face and hands. Therefore, physical evidence also permits the inference that defendant was the shooter. Furthermore, the police found defendant near crack cocaine and with money in his pocket; the victim was found without crack cocaine or money. Viewing all permissible inferences from the evidence in the light most favorable to the prosecution, the evidence was sufficient to establish beyond a reasonable doubt defendant's identity as the shooter.

Defendant argues that the testimony of the prosecution witnesses who identified defendant as the shooter was incredible. "Questions of credibility are left to the trier of fact and will not be resolved anew by this Court." *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999). Defendant's argument in this regard is without merit.

Affirmed.

/s/ Stephen L. Borrello
/s/ Elizabeth L. Gleicher
/s/ Douglas B. Shapiro