

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

REX LEE CARPENTER,

Defendant-Appellant.

UNPUBLISHED

May 20, 2010

No. 289945

Berrien Circuit Court

LC No. 2008-403547-FH

Before: MARKEY, P.J., and ZAHRA and GLEICHER, JJ.

PER CURIAM.

A jury convicted defendant of assault and battery, MCL 750.81, and malicious destruction of property with a value less than \$200, MCL 750.377a(1)(d). He was sentenced to one year of probation and ordered to pay court costs, a fine, attorney fees and restitution. He appeals as of right. We affirm. This case has been decided without oral argument pursuant to MCR 7.214(E).

I. BASIC FACTS AND PROCEEDINGS

On June 22, 2008, defendant was driving behind the complainant's car on M-140 in Berrien County. The complainant testified that defendant was tailgating behind him, initially refused to pass when given the opportunity, and then paced with his car when finally passing him. The complainant waved a pocketknife at defendant as he was being passed. He wanted defendant to understand that he should get away from him. Defendant swerved into the complainant's lane to avoid an oncoming car, causing the complainant to brake and swerve onto the shoulder of the road to avoid a collision. Defendant testified that the complainant varied his speed greatly, even coming to a complete stop on the road at one point, and purposefully refused to let him pass.

The complainant followed defendant into the parking lot of a local business after the incident. The complainant pulled up near defendant's parked car to yell at him. Defendant approached the car and used his cane to hit the complainant and smash the driver's side window. Defendant claimed the complainant was holding the knife out the window, trying to get out of his car, when defendant used his cane to hit the complainant and the window. The complainant claimed the pocketknife was folded up and in his console during this incident.

At the conclusion of the jury trial, defendant was acquitted of the original charge of assault with dangerous weapon, MCL 750.82, but found guilty of malicious destruction of property with a value less than \$200 and the lesser included offense of assault and battery.

II. PROSECUTORIL MISCONDUCT

Defendant claims on appeal that he was denied a fair trial when the prosecutor impeached his testimony with evidence of a prior misdemeanor conviction for embezzlement under \$200, MCL 750.174. We disagree.

A. STANDARD OF REVIEW

Generally, a claim of prosecutorial misconduct is reviewed de novo on appeal. *People v McGhee*, 268 Mich App 600, 630; 709 NW2d 595(2005); *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003). However, unpreserved claims of prosecutorial misconduct are reviewed for plain error. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999); *McGhee*, 268 Mich App at 630-631; *People v Rodriguez*, 251 Mich App 10, 32; 650 NW2d 96 (2002). Because defendant failed to raise this issue at trial, reversal is required only if he establishes that the plain error affected his substantial rights. *Carines*, 460 Mich App at 763.

B. ANALYSIS

A prosecutor's role and responsibility is to seek justice, not to merely convict. Accordingly, the test for prosecutorial misconduct is whether a defendant was denied a fair and impartial trial. *People v Jones*, 468 Mich 345, 354; 662 NW2d 376 (2003); *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546; *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). When a prosecutor interjects issues broader than the defendant's guilt or innocence, a defendant's right to a fair trial may be jeopardized. *McGhee*, 268 Mich App at 636; *People v Rice (On Remand)*, 235 Mich App 429, 438; 597 NW2d 843 (1999).

The prosecutor properly impeached defendant's testimony with his prior embezzlement conviction. A witness' credibility may be impeached with evidence of prior convictions, MCL 600.2159, but only if it meets the requirements of MRE 609. MRE 609(a)(1) requires that the prior conviction be examined to determine whether the conviction contained an element of dishonesty or false statement. *People v Allen*, 429 Mich 558, 605; 420 NW2d 499 (1988); *People v Parcha*, 227 Mich App 236, 241-242; 575 NW2d 316 (1997). If it does, the conviction is automatically admitted. *Allen*, 429 Mich at 593-594. As embezzlement clearly contains an element of dishonesty or false statement, it was automatically admissible under MRE 609(a)(1). MCL 750.174; *Allen*, 429 Mich at 593-594 n 15; *People v Lueth*, 253 Mich App 670, 683; 660 NW2d 322 (2002).

Defendant erroneously argues that the conviction was inadmissible because it was punishable by less than one year in jail, and that the trial court failed to employ a balancing test before admitting the conviction for impeachment purposes. The balancing test and length of sentence requirement only come into play if the prior conviction involves an element of theft. MRE 609(a)(2)(A) and (B). Because embezzlement under \$200 contains an element of dishonesty or false statement, it was automatically admissible under MRE 609(a)(1). *Allen*, 429 Mich at 593-594 n 15; *Parcha*, 227 Mich App at 241. The prosecutor's impeachment of

defendant with this prior conviction was proper and did not constitute misconduct. Defendant's argument that use of the prior conviction portrayed him as a "bad person" is also without merit. As stated by the Court in *Allen*, 429 Mich at 593-594, such convictions have high probative value and possess little likelihood of prejudice.

To the extent defendant argues his trial counsel was ineffective for failing to object to the admission of his prior embezzlement conviction, this claim is equally without merit. Because any objection to such impeachment would have lacked merit, defense counsel was not required to file and argue the motion. *People v Westman*, 262 Mich App 184, 192; 685 NW2d 423 (2004); *People v Armstrong*, 175 Mich App 181, 186; 427 NW2d 343 (1989).

Affirmed.

/s/ Jane E. Markey
/s/ Brian K. Zahra
/s/ Elizabeth L. Gleicher