DIVISION ONE
FILED: 11/29/2012
RUTH A. WILLINGHAM, CLERK
BY: mjt

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	No. 1 CA-CR 12-0208
	)	
Appellee,	)	DEPARTMENT A
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
KIMBERLY SUE WALTER,	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
Appellant.	)	
	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR2011-136817-002

The Honorable Connie Contes, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
Angela Corinne Kebric, Assistant Attorney General
Attorneys for Appellee

Marty Lieberman, Maricopa County Legal Defender — Phoenix
By Cynthia D. Beck, Deputy Legal Defender
Attorneys for Appellant

D O W N I E, Judge

¶1 Kimberly Sue Walter appeals her criminal convictions and sentences. Finding no error, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 Walter was indicted for third-degree burglary (accomplice) and possession or use of dangerous drugs. The State disclosed its intent to call various witnesses at trial, including R.B.

¶3 Walter filed a motion seeking leave to impeach R.B. at trial with a 1996 theft conviction ("Rule 609 motion"). Walter argued the burglary charge turned "almost solely" on R.B.'s testimony. The State opposed Walter's motion. The prosecutor avowed that R.B.'s criminal history revealed no felony convictions. However, based on information received from defense counsel, the State was able to locate a superior court record under R.B.'s name.[1] According to the prosecutor, R.B. confirmed "he was a defendant for a theft type charge" in 1996, but R.B. also stated he "successfully completed probation and the matter had been designated a misdemeanor." The State argued the offense of theft does not necessarily involve dishonesty, R.B.'s conviction was too old, and the offense had been designated a misdemeanor. Defense counsel replied that when

[1] We took judicial notice of superior court records that indicated R.B. was charged with a class 6 felony theft committed June 5, 1996, and that he pled guilty to a reduced charge on July 25, 1996. *See In re Sabino R.*, 198 Ariz. 424, 425, ¶ 4, 10 P.3d 1211, 1212 (App. 2000) (it is proper for a court to take judicial notice of its own records and an appellate court can take judicial notice of "anything" that the trial court could, even if the trial court was never asked to take such notice).

R.B. was convicted, the offense was a felony punishable by more than one year and argued:

> [T]heft involves dishonesty, and, as such, the jury should know what their witness has done. In this case he's the main witness for the state. It's based on his eyewitness testimony that the state is proceeding at this point. . . . the jury has a right to hear anything . . . about this particular witness [that] is going to reflect on his credibility.

The court denied the Rule 609 motion.

¶4 At trial, R.B. testified that one day in July 2011, he saw a man pulling copper through a chain link fence surrounding a scrap metal yard while a woman stood lookout near a white vehicle. R.B. made eye contact with the woman, who got into the passenger side of the vehicle. The man continued to place items into the vehicle before getting into the driver's seat and driving away. R.B. followed, called 9-1-1, and relayed the vehicle's location until officers could stop it.

¶5 Officer Mullen testified that Walter was in the front passenger seat of the white vehicle when it was stopped. Inside the passenger compartment and trunk, officers found two purses, scrap metal, pipes, copper wiring, different types of metal, and a pipe cutter. Methamphetamine was found inside one of the purses. Walter told Officer Mullen she and the driver were "going to go out," but stopped first at the scrap metal yard because the driver had seen "a section of pipe that he wanted to

get." Walter also advised the officer that she got out of the vehicle at the scrap yard, though she never admitted acting as a lookout.

¶6 Walter was convicted on both counts and received concurrent two-year terms of probation. She timely appealed. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") sections 12-120.21, 13-4031, and -4033.

DISCUSSION

¶7 Walter contends the court violated her Sixth Amendment right to confront and cross-examine witnesses by preventing her from impeaching R.B. with his theft conviction. We conclude otherwise.

¶8 As a threshold matter, Walter's arguments on appeal relate only to her burglary conviction. R.B. neither witnessed nor testified about the drug possession offense. Because Walter has identified no basis for challenging her conviction for possession or use of dangerous drugs, we do not address it further.

¶9 Turning to the burglary offense, the Sixth Amendment right to confront witnesses includes the right to impeach witnesses with evidence of a prior criminal conviction to give jurors a basis to infer that the witness would be less likely to be truthful when testifying. *Davis v. Alaska*, 415 U.S. 308, 316 (1974). "[W]hether to admit evidence of a prior conviction for

impeachment purposes is left to the sound discretion of the trial judge." *State v. Noble*, 126 Ariz. 41, 43, 612 P.2d 497, 499 (1980); *see also State v. Cañez*, 202 Ariz. 133, 153, ¶ 62, 42 P.3d 564, 584 (2002) (trial court has "wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits" on cross-examination).

¶10 If a conviction is more than ten years old, it is admissible for impeachment purposes only if the court finds that "its probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect." Ariz. R. Evid. ("Rule") 609(b)(1). It is preferable for the trial court to state its Rule 609(b) findings on the record. However, we presume that trial judges are aware of the relevant law. *State v. Moody*, 208 Ariz. 424, 443, ¶ 49, 94 P.3d 1119, 1138 (2004). Moreover, the prosecutor here correctly framed the inquiry under Rule 609(b)(1), stating that the court had "discretion to use [the 1996 conviction] if in your weighing of the factors you believe it to be appropriate." The prosecutor then argued why the relevant factors dictated against admitting R.B.'s conviction.

¶11 We find no abuse of the court's considerable discretion in excluding evidence of a 15-year-old theft conviction. Even assuming the conviction is properly analyzed

as a felony,[2] the factors relevant to admissibility weigh heavily against its use. *See Noble*, 126 Ariz. at 43, 612 P.2d at 499 (discussing relevant factors, including "the remoteness of the conviction, the nature of the prior felony, the length of the former imprisonment, the age of the [witness], and his conduct since the prior offense"). Walter's reliance on *State v. Conroy*, 131 Ariz. 528, 642 P.2d 873 (App. 1982), is unavailing. Conroy was charged with child molestation. *Id.* at 529, 642 P.2d at 874. He sought to impeach a key prosecution witness with a prior felony conviction for rape that was less than ten years old. *Id.* at 530, 642 P.2d at 875. The trial court precluded the evidence. *Id.* This court reversed, stating:

> Under the facts of the case before us, it is our opinion that the trial court erred in preventing the impeachment of Mr. Loomis by refusing to allow evidence of his prior felony rape conviction. Such error here is reversible because Mr. Loomis was a principal state's witness and was the only adult who directly tied in the defendant to the commission of the crime. As could be expected, the recollection of the five-year-old victim was often contradictory and confusing. The credibility of Mr. Loomis was therefore of the utmost importance.

Id. at 531, 642 P.2d at 876. We also noted that Conroy's defense theory was that "Mr. Loomis did not like him and that

[2] Based on the version of A.R.S. § 13-702(A) in effect in 1996, a defendant convicted of a class 6 felony could receive up to 1.5 years in prison.

Loomis had coached the young victim into making false allegations against him." *Id.* at 529-30, 642 P.2d at 874-75.

¶12 In the case at bar, there was no evidence R.B. knew Walter or had any motive to lie about what he observed. Moreover, R.B.'s testimony was not the only source of evidence regarding Walter's presence at the scrap metal yard. Walter herself admitted being there and standing outside the vehicle while her companion took items from the yard. The only additional inculpatory testimony R.B. offered was that the woman appeared to him to be acting as a lookout.[3] On cross-examination, though, R.B. conceded he was 100 feet away from the white vehicle and that he observed what was happening for "three to four seconds."

¶13 In determining whether a limitation on cross-examination constitutes a Sixth Amendment violation requiring reversal, the test is "whether [the] jury is otherwise in possession of sufficient information to assess the bias and motives of the witness." *State v. Bracy*, 145 Ariz. 520, 533, 703 P.2d 464, 477 (1985) (citing *Skinner v. Cardwell*, 564 F.2d 1381, 1389 (9th Cir. 1977)). A reasonable trial court could conclude that the probative value of R.B.'s 15-year-old theft conviction was minimal at best and was not substantially

[3] R.B. was never asked to identify Walter as the woman he saw.

outweighed by its prejudicial effect, especially given the relatively limited scope of R.B.'s testimony regarding matters in dispute. *See State v. Lucas*, 146 Ariz. 597, 606, 708 P.2d 81, 90 (1985) ("as . . . convictions become older they have increasingly less probative value on credibility"), *overruled in part on other grounds by State v. Ives*, 187 Ariz. 102, 927 P.2d 762 (1996); *cf. State v. Malloy*, 131 Ariz. 125, 127-29, 639 P.2d 315, 317-19 (1981) (a misdemeanor theft conviction does not "establish the trait of untruthfulness" that Rule 609 requires). We find no abuse of discretion in denying the Rule 609 motion. *See State v. Spreitz*, 190 Ariz. 129, 146, 945 P.2d 1260, 1277 (1997) (absent a clear abuse of discretion, an appellate court will not "second-guess" the trial court's ruling on the admissibility of evidence).

CONCLUSION

¶14 For the reasons stated, we affirm Walter's convictions and sentences.

/s/
MARGARET H. DOWNIE, Judge

CONCURRING:

/s/
JOHN C. GEMMILL, Presiding Judge

/s/
LAWRENCE F. WINTHROP, Chief Judge