STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JERRY STEWART,

Defendant-Appellant.

UNPUBLISHED
October 21, 1997

No. 182698
Calhoun Circuit Court
LC No. 94-001248

Before: Bandstra, P.J., and Hoekstra and J.M. Batzer*, JJ.

PER CURIAM.

Defendant was convicted of armed robbery, MCL 750.529; MSA 28.797, first-degree criminal sexual conduct, MCL 750.520b; MSA 28.788(2), and two counts of possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was sentenced to twenty-five to sixty years' imprisonment for the armed robbery conviction, to be served concurrently with a sentence of forty to sixty years' imprisonment for the first-degree criminal sexual conduct conviction; those two sentences were consecutive to two concurrent sentences of two years' imprisonment on the two felony-firearm convictions. Defendant now appeals as of right. We reverse.

The victim testified that he was robbed at gunpoint in his home in Battle Creek, and the victim's girlfriend, with whom he lived, was sexually assaulted. At trial, defendant admitted that he was at the victims' residence, but denied any involvement in taking any property and denied sexually assaulting the female victim.

Defendant argues that evidence of his prior conviction of receiving and concealing stolen property over $100 should not have been admitted pursuant to MRE 609. We agree. At trial, the court ruled that defendant's prior conviction was automatically admissible under MRE 609(a)(1) because the prior conviction contained an element of dishonesty. We disagree and reverse the trial court's decision to allow impeachment by evidence of a prior conviction as an abuse of discretion. *People v Bartlett*, 197 Mich App 15, 19; 494 NW2d 776 (1992).

* Circuit judge, sitting on the Court of Appeals by assignment.

MRE 609 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
>
> (1) the crime contained an element of dishonesty or false statement, or
>
> (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.

This rule requires, first, that the prior conviction must be examined to determine whether the crime contains an element of dishonesty or false statement. *People v Allen*, 429 Mich 558, 605; 420 NW2d 499 (1988), amended on other grounds sub nom *People v Pedrin*, 429 Mich 1216 (1988). If so, the prior conviction is automatically admitted into evidence without further consideration.[1] *Id.* If not, the court must determine whether the crime contains an element of theft. *Id.* If the prior conviction does not contain an element of theft, the crime is excluded from evidence. *Id.* If the crime is a theft crime and is punishable by more than one year in prison, then a probative value and prejudicial effect determination must be made in accordance with the balancing test of MRE 609(a)(2)(B). *Id.* at 605-606.

As to the first consideration, whether the prior conviction contains an element of dishonesty or false statement, our Supreme Court stressed that a prior conviction is only to be automatically admitted where dishonesty or false statement is an "actual element" of the offense in question. *Id.* at 594, n 15. The prior conviction at issue in this case, receiving and concealing stolen property over $100, contains the following elements: (1) the property was stolen, (2) the property had a fair market value over $100, (3) the defendant bought, received, possessed, or concealed property with the knowledge that the property was stolen, and (4) the property was identified as being previously stolen. *People v Quinn*, 219 Mich App 571, 574; 557 NW2d 151 (1996); *People v Gow*, 203 Mich App 94, 96; 512 NW2d 34 (1993). After examining the elements, we conclude that receiving or concealing stolen property does not contain an "actual element" of dishonesty or false statement as required by *Allen*.

Clearly, a false statement is not a necessary element of receiving or concealing stolen property. In contrast, at first glance it would appear, at least in a broad sense, that the crime of receiving and concealing stolen property would be a crime of dishonesty. However, the Supreme Court in *Allen* adopted a narrow interpretation of "dishonesty" for purposes of MRE 609(a)(1). The Supreme Court defined "dishonesty" as "refer[ring] specifically to lying, deceit, misrepresentation or a lack of veracity."

Allen, supra. None of the elements contained in receiving and concealing stolen property involve lying, deceit, misrepresentation, or a lack of veracity. Although receiving and concealing does contain the element of knowledge by a defendant that the property was stolen, "a mere willingness to engage in criminal conduct" does not demonstrate "dishonesty." *Id.* The knowledge element does not equate with defrauding, deceiving, or cheating someone and is thus distinguishable from the crimes delineated in *Allen* as containing an element of dishonesty.[2] *Id.* Thus, the trial court abused its discretion in automatically admitting into evidence defendant's prior conviction under MRE 609(a)(1).

However, receiving and concealing stolen property over $100 does constitute a theft crime and, if its probative value outweighs its prejudicial effect, evidence regarding that offense is admissible under MRE 609(a)(2)(B).[3] *Allen, supra* at 595-596. In the present case, the trial court should have applied this balancing test to determine admissibility. *Id.*

Allen outlined the factors to be considered in determining whether evidence of a prior conviction of a theft crime is too prejudicial for admission:

> For purposes of the prejudice factor, only the similarity to the charged offense and the importance of the defendant's testimony to the decisional process would be considered. The prejudice factor would, of course, escalate with increased similarity and increased importance of the testimony to the decisional process. Finally, unless the probativeness outweighs the prejudice, the prior conviction would be inadmissible. [*Id.* at 606.]

With respect to the prejudice factor, defendant's testimony was crucial to his defense; this case rested on little physical evidence and was primary a credibility contest. Also, the primary offense in this case, armed robbery, is a theft crime like receiving and concealing stolen property. We conclude that the prejudice factor greatly outweighs any probative value evidence of the prior offense might properly have had for the jury and that, accordingly, the prior conviction should have been excluded.

A trial court's error in admitting a prior conviction may nevertheless be harmless error where the evidence against the defendant was so overwhelming that a reasonable juror could not have voted to acquit the defendant even if the conviction was excluded. *Bartlett, supra; People v Clemons*, 177 Mich App 523, 527; 442 NW2d 717 (1989). As stated above, however, this case lacked substantial physical evidence and rested primarily on a credibility contest; a reasonable juror could have voted to acquit defendant if he had not been impeached. Therefore, we cannot conclude that the trial court's error was harmless.

We have reviewed defendant's other arguments and find them to be without merit or moot in light of our disposition of the above issue. We reverse defendant's convictions and remand for a new trial. We do not retain jurisdiction.

/s/ Richard A. Bandstra
/s/ Joel P. Hoekstra

[1] Evidence of prior convictions containing an element of dishonesty or false statement is automatically admissible because these crimes are highly probative of a witness' truthfulness and possess little likelihood of prejudice. *Allen, supra* at 593-594.

[2] For example, the dishonesty crimes of embezzlement and false pretenses cited by the Court in *Allen, supra*, contain an element of intent to defraud or cheat. *People v Wood*, 182 Mich App 50, 53; 451 NW2d 563 (1990)(embezzlement); *People v Peach*, 174 Mich App 419, 422; 437 NW2d 9 (1989)(false pretenses).

[3] Although no case since *Allen* has specifically concluded that receiving and concealing stolen property contains a theft element, we conclude that it does. Receiving and concealing stolen property is listed within the larceny crime list in the Michigan Sentencing Guidelines (2nd ed, 1988), p 19, and larceny contains an element of theft, *Allen, supra* at 596, n 17. We also note that the parties agree that receiving and concealing stolen property contains a theft element as required by MRE 609(a)(2). Furthermore, the parties do not dispute that receiving and concealing stolen property over $100 is punishable by imprisonment in excess of one year, thereby fulfilling the requirement of MRE 609(a)(2)(A). MCL 750.535; MSA 28.803.