

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DONALD E. TURNER,

Defendant-Appellant.

UNPUBLISHED

November 13, 1998

No. 199996

Recorder's Court

LC No. 96-003518

Before: Murphy, P.J., and Fitzgerald and Gage, JJ.

PER CURIAM.

Defendant was convicted by a jury of possession of less than twenty-five grams of heroin, MCL 333.7403(2)(a)(v); MSA 14.15(7403)(2)(a)(v), and was sentenced as an habitual offender, fourth offense, MCL 769.12; MSA 28.1084, to a prison term of eighteen months to fifteen years. He appeals as of right. We affirm defendant's conviction, but remand for resentencing.

Defendant first contends that the trial court failed to recognize its discretion when it sentenced defendant to a maximum term of fifteen years as a fourth habitual offender. We agree. After imposing a sentence of eighteen months to four years for the possession conviction, the trial court was advised that defendant was charged as a fourth felony offender. The trial court then responded that, "[u]nder the law I *have* to set aside that sentence. I have to change the maximum." The trial court's failure to exercise its discretion because of a mistaken belief that enhancement was mandatory entitles defendant to be resentenced on remand. *People v Green*, 205 Mich App 342, 346; 517 NW2d 782 (1994). However, we reject defendant's argument that the eighteen month to fifteen year sentence violates the principle of proportionality under *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990).

Defendant next argues that the trial court abused its discretion by allowing defendant's prior conviction for attempted breaking and entering to be used for impeachment purposes under MRE 609(a)(2)(B). We disagree. Theft crimes are strongly probative of a witness' veracity in comparison with most other crimes. *People v Allen*, 429 Mich 558, 595; 420 NW2d 499 (1988). However, the trial court still must consider the possible chilling effect that admission of a prior crime might have on a defendant's decision to testify. MRE 609(b); *Allen, supra* at 602. The court must also consider the

similarity of the prior conviction with the crime charged. MRE 609(b); *People v Daniels*, 192 Mich App 658, 671; 482 NW2d 176 (1991). The fact that defendant actually testified at trial shows that there was no chilling effect on his right to testify. *People v Coddington*, 188 Mich App 584, 595-596; 470 NW2d 478 (1991). In fact, defendant even used his prior conviction and parole status to support his own version of events. *Coddington, supra* at 596. Further, there is no similarity at all between the prior conviction and the crime charged. When there is no similarity between the two, prejudice is minimal. *Daniels, supra* at 671. Because defendant's prior conviction was highly probative and minimally prejudicial, we conclude that the trial court did not abuse its discretion in allowing evidence of defendant's prior conviction. *People v Taylor*, 195 Mich App 57, 60; 489 NW2d 99 (1992).

Defendant also argues that the trial court erred by allowing the prosecutor to ask him if he had lied to the police on prior occasions about his identity. This Court has held that it is inappropriate for a prosecutor to inquire about a defendant's use of an alias on some past, unspecified occasion. *People v Thompson*, 101 Mich App 609, 613; 300 NW2d 645 (1980). Here, however, the prosecutor's questioning linked defendant's use of an alias with his intent to deceive. Hence, the evidence was relevant to defendant's credibility and was properly admitted. *Id.* at 613-614; *People v Messenger*, 221 Mich App 171, 180; 561 NW2d 463 (1997).

Lastly, defendant asserts that the prosecutor improperly injected defendant's character into evidence by impeaching him with aliases, drug use, and employment status, and by calling a witness to support these collateral matters. We disagree.

As discussed above, the prosecution's questions regarding defendant's aliases were proper. Defendant failed to object to the prosecutor's questions regarding his drug use and employment status. We decline to review this issue because any prejudicial effect of the questions could have been cured by a cautionary instruction and failure to review the issue will not result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

Defendant also failed to object to the admission of the rebuttal testimony. Because our failure to review this issue will not result in manifest injustice, we decline to address it. *People v Kelly*, 423 Mich 261, 281; 378 NW2d 365 (1985).

Defendant's conviction is affirmed, and the case is remanded for resentencing. Jurisdiction is not retained.

/s/ William B. Murphy
/s/ E. Thomas Fitzgerald
/s/ Hilda R. Gage