

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ELMER HAROLD RUNYON,

Defendant-Appellant.

UNPUBLISHED

December 4, 1998

No. 199384

Oakland Circuit Court

LC No. 95-142616 FC

Before: White, P.J., and Markman and Young, Jr., JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a); MSA 28.788(2)(1)(a), one count of second-degree criminal sexual conduct, MCL 750.520c(1)(a); MSA 28.788(3)(1)(a), and two counts of assault with intent to commit sexual penetration, MCL 750.520g(1); MSA 28.788(7)(1). He was sentenced as an habitual offender, third offense, MCL 769.11; MSA 28.1083, to concurrent prison terms of eighteen to thirty years for each of the first-degree criminal sexual conduct convictions, ten to twenty years for the second-degree criminal sexual conduct conviction, and five to twenty years for each of the assault with intent to commit sexual penetration convictions. Defendant appeals his convictions as of right. We affirm.

Defendant argues first on appeal that the trial court erred in allowing the prosecutor to impeach defendant with two prior theft convictions. We disagree. We review for an abuse of discretion a trial court's decision to allow impeachment by evidence of a prior conviction. *People v Coleman*, 210 Mich App 1, 6; 532 NW2d 885 (1995). An abuse of discretion exists when an unprejudiced person, considering the trial record, would conclude that there was no justification or excuse for the ruling. *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996).

Evidence of a prior conviction may be admitted to impeach the credibility of a witness if the crime contained an element of dishonesty or false statement, or, if the crime contained an element of theft, if it was punishable by imprisonment in excess of one year or death, and the court determines that the evidence is significantly probative of credibility and the probative value outweighs its prejudicial effect. MRE 609; *People v Allen*, 429 Mich 558, 606; 420 NW2d 499 (1988); *People v Parcha*,

227 Mich App 236, 241-242; 575 NW2d 316 (1997). In determining the probative value of the convictions, the court must consider the age of the crime and whether the crime is indicative of veracity. In evaluating the prejudicial effect, the trial court considers the similarity of the prior crime to the charged offense and the potential effect on the decisional process if admitting the evidence causes the defendant not to testify. *Allen, supra* at 606.

Defendant pleaded guilty in January 1988 to burglary and receiving and concealing stolen property. Theft-related offenses such as these are “an indicator that defendant is of dishonest character and may not testify truthfully.” *People v Cross*, 202 Mich App 138, 147; 508 NW2d 144 (1993). While defendant’s convictions were over eight years old, neither was for an assaultive crime, and we conclude that both were at least moderately probative of defendant’s veracity. *Allen, supra* at 610-611. In addition, while we recognize the importance of defendant’s testimony in the decisional process, the crimes with which defendant was impeached were dissimilar from those with which he was charged, making the prejudicial effect low. Hence, the cases that defendant cites are inapposite. The trial court did not abuse its discretion in allowing defendant to be impeached with the prior convictions.

Defendant next argues on appeal that, while questioning defendant on cross-examination, the prosecutor engaged in misconduct denying defendant a fair trial. Defendant contends that the prosecutor (1) elicited testimony that, while defendant pleaded guilty to burglary in a prior case, he was actually charged with aggravated burglary; (2) put before the jury evidence concerning defendant’s prior sentences; and (3) referred to defendant as a “convicted felon.”

Because defendant failed to object below, review is precluded unless the alleged misconduct was so serious that no curative instruction could have removed the prejudice to defendant, or if failure to review would result in manifest injustice. *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 341-342 (1995). Neither condition is satisfied here. Defendant on direct examination “opened the door to the questions asked by the prosecutor with regard to the circumstances surrounding the conviction.” *People v Maleski*, 220 Mich App 518, 523; 560 NW2d 71 (1996).¹ Moreover, because there was no direct questioning about defendant’s prior sentences, *People v Rappuhn*, 390 Mich 266; 212 NW2d 205 (1973), and *People v Lindberg*, 162 Mich App 226; 412 NW2d 272 (1987) are distinguishable. See *People v Jones*, 106 Mich App 429, 435-436; 308 NW2d 243 (1981). Defendant is not entitled to a new trial simply because the jury was indirectly informed of the prior sentences as a result of the admission of evidence to which he did not object. Finally, we are not persuaded that defendant was denied a fair trial when the prosecutor asked defendant if he was a convicted felon.

Defendant’s final argument on appeal is that the trial court erred in allowing the victim’s teenage sister to testify, pursuant to the “tender years” hearsay exception to the hearsay rule, MRE 803A, concerning statements made to her by the then nine-year-old victim. We review the trial court’s decision for an abuse of discretion. *People v Hammons*, 210 Mich App 554, 558; 534 NW2d 183 (1995).

Defendant argues that the year-and-a-half delay between the alleged sexual abuse and the victim’s disclosure of those acts to his sister was not excusable under MRE 803A(3), and that the

victim's statements to his sister were not spontaneous and without indication of manufacture, as required by MRE 803(2), because he made them only after being confronted about his improper sexual contact with another child. We disagree. There is no evidence that the details of the abuse were suggested to the victim or that he was asked leading questions in that regard. Moreover, while the victim did not reveal the instance of abuse until over a year after he alleged it happened, this Court has said that fear for one's safety and fear of reprisals against the perpetrator, both of which are evidenced by the record in this case, are circumstances excusing delay under MRE 803A. See *Hammons, supra*; *People v Dunham*, 220 Mich App 268; 559 NW2d 360 (1996). We find no abuse of discretion in the trial court's decision.

Affirmed.

/s/ Helene N. White

/s/ Stephen J. Markman

/s/ Robert P. Young, Jr.

¹ We further note that the prosecution made no mention of the plea bargain in his closing argument.