STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 3, 2004
v	No. 247208 Wayne Circuit Court
APOLLO D. WADE, Defendant-Appellant.	LC No. 02-010252

Before: Schuette, P.J., and Bandstra and Cooper, JJ.

PER CURIAM.

Defendant appeals as of right his jury-trial conviction of armed robbery, MCL 750.529; carjacking, MCL 750.529a; and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to 15 to 25 years' imprisonment on the armed robbery and carjacking counts, and was sentenced to 2 years' imprisonment on the felony-firearm count. Defendant appeals as of right. We affirm.

This case arises out of defendant's armed robbery and carjacking of Maurice Haggen. Haggen was driving his 1992 Eldorado and Damon Williams was riding as a passenger. They were en route to Williams' house, when they saw defendant on the sidewalk, and pulled over to the curb to talk. According to Haggen, defendant got into the car, and when they stopped in front of Williams' house, defendant produced a handgun, pointed it at him, and demanded his money. Haggen told defendant that he did not have any money, and started driving away. As they were driving, defendant took $2,200 in cash out of Haggen's pocket, and approximately $13,500 worth of jewelry off of Haggen's person. Haggen stopped the car at an intersection and attempted to escape, but defendant threatened to shoot him in the leg and to shoot the television set that was mounted in the car. Defendant then fired a shot into the console, and Haggen resumed driving. When Haggen again stopped the car, he and Williams got out and ran away. Defendant fired two more shots, and then got into the driver's seat and drove away. Haggen's car was recovered the following day, stripped and abandoned.

Defendant's theory of the case was that Haggen and Williams drove up to his aunt and uncle's house, where he was standing on the porch, and asked him if he wanted to make some money. Defendant maintained that Haggen and Williams got out of the car, gave him the keys, and offered to pay him $200 if he would strip the car of its parts, so that Haggen could recover on an insurance claim. Defendant maintained that he was accused of carjacking when he failed to give some of the stripped parts back to Haggen for resale.

Defendant first argues that he was denied the effective assistance of counsel because his trial attorney failed to investigate the case and call purported eyewitnesses to testify on his behalf. "Because defendant failed to move for a new trial or request a *Ginther*[1] hearing below, our review of this issue is limited to mistakes apparent on the appellate record." *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). "If the record does not contain sufficient detail to support defendant's ineffective assistance claim, then he has effectively waived the issue." *Id*.

Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy, and we will not substitute our judgment for that of counsel regarding such matters. *Davis, supra* at 368. Additionally, defendant must overcome a strong presumption that the assistance of his counsel was sound trial strategy, and he must show that, but for counsel's error, the outcome of the proceedings would have been different. *People v Sabin* (*On Second Remand*), 242 Mich App 656, 659; 620 NW2d 19 (2000). Defendant claims that his counsel was ineffective for failing to call purported eyewitnesses who would have substantiated his claim that Haggen solicited him to strip the car so that he could recover on an insurance claim. However, at trial, defendant never claimed that anyone witnessed the alleged business agreement, and the record does not suggest how such witnesses could have benefited defendant's case. Even defendant's affidavit listing purported eyewitnesses, filed after the trial proceedings, does not suggest that they would have corroborated his version of events. Further, the affidavit suggests that trial counsel attempted to talk to the alleged witnesses, albeit unsuccessfully.

Because there is no evidence on the record to support defendant's assertion, he has effectively waived the issue for review. *People v Marji*, 180 Mich App 525, 533; 447 NW2d 835 (1989). Further, defendant failed to demonstrate a reasonable probability that, even if defense counsel had called the alleged eyewitnesses, the outcome of the proceedings would have been different. Defendant has failed to meet his burden of proving ineffective assistance of counsel, and is not entitled to relief on this basis.

Defendant next argues that the evidence at trial was insufficient to support his conviction for carjacking. We disagree. In determining whether sufficient evidence has been presented to sustain a conviction, a reviewing court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992). The reviewing court is required to draw all reasonable inferences and make credibility determinations in support of the jury verdict. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

"In order to prove carjacking, the prosecution must prove (1) that the defendant took a motor vehicle from another person, (2) that the defendant did so in the presence of that person, a passenger, or any other person in lawful possession of the motor vehicle, and (3) that the defendant did so either by force or violence, by threat of force or violence, or by putting another in fear." *People v Green*, 228 Mich App 684, 694; 580 NW2d 444 (1998). Defendant argues on

[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

appeal that while the evidence arguably supports the prosecutor's contention that he took Haggen's jewelry and cash by force or threat of force, it does not support the assertion that he took Haggen's vehicle by force or threat of force. However, Haggen testified that defendant took his cash and jewelry at gunpoint and threatened to shoot the television in the car and shoot him in the leg when he attempted to escape. Defendant then fired a shot into the console, and Haggen resumed driving; when Haggen again stopped the car, he and Williams got out and ran away, while defendant fired two additional shots. As a result of defendant's conduct, Haggen feared for his safety.

Viewing the evidence in a light most favorable to the prosecution, a rational jury could conclude that defendant took Haggen's car while putting him in fear and using force and violence. There was sufficient evidence to sustain defendant's conviction for carjacking, and defendant is not entitled to relief on this basis.

Finally, defendant argues that the trial court abused its discretion in allowing his 1994 conviction for receiving and concealing stolen property, MCL 750.535, to be used to impeach his credibility as a witness. Defendant argues that receiving and concealing stolen property does not contain an element of theft as required for admission pursuant to MRE 609(a)(2). Further, defendant argues that even if the crime of receiving and concealing stolen property does contain a theft element, its prejudicial effect outweighed its probative value, in contravention of MRE 609(a)(2)(B) and MRE 609(b).

We review a trial court's decision to allow impeachment by evidence of a prior conviction for an abuse of discretion. *People v Coleman*, 210 Mich App 1, 6; 532 NW2d 885 (1995). An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling made. *People v Williams*, 240 Mich App 316, 320; 614 NW2d 647 (2000).

A witness' credibility may be impeached with evidence of prior convictions if the criteria set forth in MRE 609 are satisfied. MCL 600.2159; *People v Nelson*, 234 Mich App 454, 460; 594 NW2d 114 (1999). MRE 609 provides in pertinent part:

> (a) 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.
>
> (b) For purposes of the probative value determination required by subrule (a)(2)(B), the court shall consider only the age of the conviction and the degree to which a conviction of the crime is indicative of veracity. If a determination of prejudicial effect is required, the court shall consider only the conviction's similarity to the charged offense and the possible effects on the decisional process if admitting the evidence causes the defendant to elect not to testify. The court must articulate, on the record, the analysis of each factor.

Contrary to defendant's argument, for purposes of MRE 609, our Court considers receiving and concealing stolen property to be a theft crime. See *People v Clark*, 172 Mich App 407, 418-420; 432 NW2d 726 (1988) and *People v Dinsmore*, 166 Mich App 33; 420 NW2d 167 (1988); *People v Dinsmore*, 430 Mich 894; 425 NW2d 91 (1988) [remanded for reconsideration in light of *People v Allen*, 429 Mich 558, 605-606; 420 NW2d 499 (1988)]; *People v Dinsmore (On Remand)*, 172 Mich App 561, 562; 432 NW2d 324 (1988). Therefore, we must consider the balancing test set forth in MRE 609(b) and articulated by our Supreme Court in *Allen*, *supra* at 605-606:

> [T]he trial judge [may] exercise his discretion in determining the admissibility of evidence by examining the degree of probativeness and prejudice inherent in the admission of the prior conviction. For purposes of the probativeness side of the equation, only an objective analysis of the degree to which the crime is indicative of veracity and the vintage of the conviction [sh]ould be considered, not either party's need for the evidence. 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 [sh]ould 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 [sh]ould be inadmissible.

Because the crime of receiving and concealing stolen property is a theft crime, it is moderately indicative of veracity, and thus has moderate probative value. *Clark*, *supra* at 419. Our Supreme Court has held that "for those convictions occurring less than ten years prior to the relevant case, the vintage of the prior conviction and the defendant's behavior subsequent to that conviction are relevant to probativeness." *Allen*, *supra* at 606, n 32. Here, defendant was convicted of receiving and concealing stolen property in 1994; therefore, his conviction was eight years old at the time of trial, and thus has only minimal probative value.

Pursuant to MRE 609(b), "if a determination of prejudicial effect is required, the court shall consider only the conviction's similarity to the charged offense and possible effects on the decisional process if admitting the evidence causes the defendant to elect not to testify." Receiving and concealing stolen property, MCL 750.535, is classified under the "stolen, embezzled or converted property" section of the Michigan Penal Code, and is categorized as a crime against property in the Michigan Sentencing Guidelines Act, MCL 777.16z. Conversely, armed robbery, MCL 750.529, and carjacking, MCL 750.529a, are classified under the "robbery" section of the Michigan Penal Code, and are categorized as crimes against persons in the

Michigan Sentencing Guidelines Act, MCL 777.16y. However, the stolen property that defendant was convicted of receiving and concealing was a car, thereby increasing the similarity between the charged offense and the prior conviction. Additionally, defendant's decision to testify was critical to his defense, because the case was primarily a credibility contest between Haggen and Williams, and defendant. *People v Johnson*, 170 Mich App 808, 810-811; 429 NW2d 237 (1988); *People v Minor*, 170 Mich App 731, 736-737; 429 NW2d 229 (1988). Although defendant still testified and was able to present his theory of the case, the prejudicial impact of impeachment with the use of evidence of a conviction for a similar crime outweighed the limited probative value of the evidence. Under *Clark*, *supra* at 419, because the probativeness did not outweigh the prejudice, we conclude that the trial court abused its discretion in allowing defendant to be impeached by evidence of his prior conviction for receiving and concealing stolen property.

However, on the facts presented, we conclude that the error in allowing defendant to be impeached by evidence of his prior conviction for receiving and concealing stolen property was harmless and does not require reversal because defendant has not demonstrated prejudice. *People v McDaniel*, 256 Mich App 165, 168; 662 NW2d 101 (2003). "The error is presumed harmless, and the defendant bears the burden of showing that the error resulted in a miscarriage of justice." *Id*., citing *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999) and *People v Lukity*, 460 Mich 484, 493-494; 596 NW2d 607 (1999).

In the instant case, Haggen and Williams provided credible and consistent accounts of the incident, and testified that defendant robbed Haggen at gunpoint and took his car. Further, the prosecutor only briefly questioned defendant about his prior conviction during cross-examination, did not refer to the crime by name, and did not mention it during closing argument. We find no basis to conclude that it is more probable than not that error in allowing defendant to be impeached with evidence of his prior conviction undermines the reliability of the jury's verdict. *McDaniel*, *supra* at 169. Accordingly, defendant is not entitled to relief on this basis.

We affirm.

/s/ Richard A. Bandstra
/s/ Jessica R. Cooper