

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TYRONE MARTIN,

Defendant-Appellant.

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UNPUBLISHED

November 20, 2008

No. 280334

Wayne Circuit Court

LC No. 07-006943-01

Before: Servitto, P.J., and Donofrio and Fort Hood, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, felon in possession of a firearm, MCL 750.224f, carjacking, MCL 750.529a, armed robbery, MCL 750.529, and third-degree fleeing a police officer, MCL 257.602a(3). Defendant was sentenced to 17 to 30 years' imprisonment for the carjacking and armed robbery convictions, two to five years' imprisonment for the third-degree fleeing a police officer and felon in possession of a firearm convictions, and two years' imprisonment for the felony-firearm conviction. This case has been decided without oral argument pursuant to MCR 7.214(E). Because the admission of defendant's prior conviction for impeachment purposes did not result in a miscarriage of justice, we affirm.

On appeal, defendant argues that the trial court abused its discretion when it ruled that evidence of his prior conviction for unarmed robbery for purposes of impeachment was admissible, and that this abuse of discretion constitutes error requiring reversal. Defendant, however, arguably waived review of this issue.

Generally, a defendant may not introduce evidence at trial, and then argue on appeal that the evidence denied him a fair trial. *People v Knapp*, 244 Mich App 361, 378; 624 NW2d 227 (2001). Here, before defendant took the stand to testify on his own behalf, the prosecution indicated that it intended to use defendant's prior conviction as impeachment evidence. Defendant objected to the introduction of the evidence. The trial court heard arguments from both sides and then ruled that the prior conviction would be admissible. During direct examination, defense counsel preemptively raised the issue of defendant's prior conviction. The prosecution did not question defendant regarding this prior conviction during cross-examination. Michigan Courts have not ruled on whether a defendant's preemptive introduction of his own prior conviction, after the trial court has ruled that the conviction will be admissible for

impeachment, bars review of the trial court's decision. The United States Supreme Court however, has decided this issue.

In *Ohler v United States*, 529 US 753; 120 S Ct 1851; 146 L Ed 2d 826 (2000), as in this case, the trial court ruled that the defendant's prior conviction could be used against her for impeachment, so she preemptively raised the issue on direct examination. *Id.* at 755. She then challenged the admission of her prior conviction. The *Ohler* court determined that by offering the testimony herself, the defendant in *Ohler* denied the government its right to decide whether to actually use her prior conviction against her after it heard her direct testimony. *Id.* at 758. According to the *Ohler* court, appellate review is only applicable after the government has exercised its option to elicit testimony regarding a defendant's prior convictions. *Id.* at 759. Our Supreme Court ultimately held that "a defendant who preemptively introduces evidence of a prior conviction on direct examination may not on appeal claim that the admission of such evidence was error." *Id.* at 760.

In the instant case, defendant preemptively testified regarding his prior conviction for unarmed robbery on direct examination. The prosecution did not cross-examine defendant on the subject or elicit further testimony from him with respect to that conviction. Therefore, defendant has arguably waived his right to review the trial court's decision to admit this evidence. In any event, reviewing the merits of defendant's argument on appeal leads us to conclude that reversal is not warranted.

A trial court's decision to admit evidence is reviewed for abuse of discretion. *People v Martin*, 271 Mich App 280, 315; 721 NW2d 815 (2006). An abuse of discretion has occurred "when the trial court chooses an outcome that falls outside the range of reasonable and principled outcomes." *People v Unger*, 278 Mich App 210, 217; 749 NW2d 272 (2008). A trial court's decision on a close legal question ordinarily cannot constitute an abuse of discretion, though its application of an incorrect legal framework can. *People v Hine*, 467 Mich 242, 250-251; 650 NW2d 659 (2002) (quoting *Dep't of Transportation v Randolph*, 461 Mich 757, 768; 610 NW2d 893 (2000)).

In *People v Meshell*, 265 Mich App 616, 634-635; 696 NW2d 754 (2005) (quoting MRE 609), this Court held that evidence of a witness's prior convictions can only be admitted to impeach that witness's credibility when:

- (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.

For crimes that involve an element of theft, *Meshell, supra* at 635, supplies the following explanation for the balancing test required:

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.

Unarmed robbery, the prior conviction admitted by the trial court in this case, contains an element of theft (See, *People v Randolph*, 242 Mich App 417, 419; 619 NW2d 168 (2000), reversed in part on other grounds, *People v Randolph*, 466 Mich 532, 648 NW2d 164 (2002)) and is punishable by up to 15 years' imprisonment (MCL 750.530). The trial court was thus required to apply, on the record, the balancing test set forth in *Meshell, supra* at 635.

In consideration of the probative value of defendant's unarmed robbery conviction, the trial court considered that less than a year had elapsed since its commission, and recognized that the crime included an element of theft. While considering the prejudicial effect that admission of the prior conviction would have, the trial court compared unarmed robbery to the charged offenses of fleeing a police officer, carjacking, and armed robbery, as well as the fact that the charge for felon in possession of a firearm already alerted the jury to the existence of defendant's prior criminal record. The trial court did not expressly articulate its findings with respect to either the degree to which an unarmed robbery conviction is indicative of veracity or the effect that defendant's decision not to testify might have on the trial proceedings. However, as indicated in *Meshell*, a failure to articulate specific factors on the record is not grounds for reversal if "the trial court was aware of the pertinent factors and its discretion." *Meshell, supra* at 638. In the instant case, while the trial court failed to address only two of the listed factors, its decision indicates that it was aware of both its discretion and the proper balancing test. Thus, reversal is not warranted.

Defendant next argues that the trial court abused its discretion in allowing admission of his prior conviction because the conviction for unarmed robbery is too similar to the charged offenses of armed robbery and carjacking to pass the balancing test. We agree.

In *People v Allen*, 429 Mich 558, 611; 420 NW2d 499 (1988), the trial court allowed one of the defendants (Brooks) who was charged, in 1981, with armed robbery and felony-firearm to be impeached with evidence of his prior conviction for unarmed robbery in 1981, and two prior convictions for armed robbery in 1975. *Id.* The Michigan Supreme Court ruled that the evidence should have been excluded because the similarity between armed robbery and unarmed robbery was highly prejudicial, and because the defendant was the only witness offered by the defense at trial. *Id.* at 612. Similarly, in the instant case, these same prejudicial factors also outweigh the moderately probative value of the prior conviction, and the evidence should have been excluded.

Although the evidence of defendant's prior conviction should have been excluded, a conviction shall not be overturned based on the improper admission of evidence unless, upon

review of the entire case, it appears that the error resulted in a miscarriage of justice. *People v Young*, 472 Mich 130, 141; 693 NW2d 801 (2005). Defendant argues, citing *People v Therrien*, 97 Mich App 633, 635; 296 NW2d 8 (1979), that the error in this case resulted in a miscarriage of justice because the conviction rested exclusively on the outcome of a credibility contest, and evidence used to impeach credibility is not harmless in cases where the trial was a credibility contest. However, this Court reached its decision to reverse the defendant's convictions in *Therrien* on the ground that the only evidence offered to prove the guilt of the defendant was the testimony of the complainant. *Id.* In the instant case, defendant's convictions were not based on a credibility contest, because they were not based solely on the testimony of the complainant.

Defendant admitted that he stole the vehicle. The complainant affirmatively identified defendant as the person who robbed him, and defendant offered no explanation for why the complainant would have perjured himself. While driving the stolen vehicle, defendant fled the police. When he was arrested, he was found with the complainant's social security card and identification in his pocket. Further, defendant's credibility was weakened by the fact that he admitted that he lied to police and gave a false name when he was arrested. Although defendant's prior conviction was improperly admitted and would have served to weaken the defendant's credibility, the evidence supporting defendant's convictions (absent defendant's testimony) was overwhelming, and any error caused by the improper admission of his prior conviction did not result in a miscarriage of justice.

Affirmed.

/s/ Deborah A. Servitto

/s/ Pat M. Donofrio

/s/ Karen M. Fort Hood