STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 29, 2009
v	No. 286269 Oakland Circuit Court
DANIEL DERRELE MABIN, Defendant-Appellant.	LC No. 2008-218685-FH

Before: Davis, P.J., and Whitbeck and Shapiro, JJ.

SHAPIRO, J. (*dissenting*).

I respectfully dissent because I do not believe that the trial court's error in requiring admittance of defendant's prior felonies can be considered harmless.

Defendant was charged with felon in possession of a firearm, MCL 750.224f and, based on that charge, felony firearm, MCL 750.227b. Prior to selection of a jury, the defense requested that the trial court allow defendant to stipulate to the existence of a prior felony rather than allowing the prosecution to inform the jury of the specific prior crimes, namely armed robbery and assault with intent to commit murder.

As noted by the majority, the specific felonies that defendant had been convicted of had no greater relevance to this case than did the fact that defendant was convicted of an unnamed felony. The nature of the felony, other than the fact that it is a felony, has no probative value as to the applicability of MCL 750.224f. Whatever the prior felony was, that element of the offense was met. The prosecution's brief does not articulate any increased probative value resulting from the identification of the specific felony and when asked directly about it at oral argument, the prosecutor, quite understandably, could not define any increased probative value. Similarly, at trial, when defendant asked that the trial court accept a stipulation that defendant was a felon, the trial court offered no reason for its refusal to accept the stipulation stating only, "motion denied."

It is difficult to see how a reasonable jury, regardless of the instructions it is given, would not be affected by the knowledge that defendant, accused in this case of having an assault rifle, had previously been convicted of armed robbery and assault with intent to commit murder. As noted by the Supreme Court in *People v Allen*, 429 Mich 558, 569; 420 NW2d 499 (1988),

evidence of prior criminal history, particularly where it involves such disturbing offenses as armed robbery and assault with intent to murder,

> presents three types of impropriety. First, that the jurors may determine that although defendant's guilt in the case before them is in doubt, he is a bad man and should therefore be punished. Second, the character evidence may lead the jury to lower the burden of proof against the defendant, since, even if the guilty verdict is incorrect, no "innocent" man will be forced to endure the punishment. Third, the jury may determine that on the basis of his prior actions, the defendant has a propensity to commit crimes, and therefore his probably is guilty of the crime with which he is charged. All three of these dimensions suggest a likelihood that innocent persons may be convicted. [*Id.* (citation omitted)].

I disagree with the majority that the evidence was so overwhelming in this case that this error is harmless. There was evidence that a police officer using binoculars on a rainy night saw defendant with a rifle for a brief period. Defendant had no weapon at the time he was arrested and, although there was ammunition at his dwelling that fit the rifle, the rifle itself was not present. I agree that there is more than sufficient evidence to convict, but that is not the standard.

Error justifies reversal if it is more probable than not that it affected the outcome. *People v Young*, 472 Mich 130, 141-142; 693 NW2d 801 (2005). "An error is deemed to have been 'outcome determinative' if it undermined the reliability of the verdict." *Id.* at 142, quoting *People v Elston*, 462 Mich 751, 766; 614 NW2d 595 (2000). Given that the trial court's error subjected the verdict to all of the dangers set forth in *Allen*, I see no way to conclude anything other than that the error influenced this verdict. This is particularly true given that the prior felonies were repeatedly brought up. They were referenced in the trial court's reading of the information at the outset of jury selection, during the prosecutor's opening statement, during the arresting officer's testimony, and in the prosecutor's closing argument. A certified copy of defendant's conviction record for these two offense was admitted into evidence and the trial court's final instructions to the jury advised them that one of the elements they must find to convict defendant of felon in possession is "defendant was convicted of armed robbery and/or assault with intent to murder."

Finally, the prosecution's inability to articulate at trial, in its brief on appeal, or at oral argument, any reason why these prior offenses should have been admitted despite the defense's offer to stipulate, suggests that the purpose for which they were admitted was to affect the jury in the ways set forth as improper in *Allen*. We should be cautious in application of the harmless error rule where there is good cause to believe that the evidence was offered because of, rather than in spite of, its unfair prejudice. See *People v Minor*, 213 Mich App 682, 686; 541 NW2d 576 (1995) (an error can be intolerable to the judicial system if it was deliberately injected into the proceedings by the prosecution, if it was particularly persuasive or inflammatory).

Given the inflammatory nature of the error involved, I would reverse and remand for a new trial.

/s/ Douglas B. Shapiro