STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIAM JAMES SHORT,

Defendant-Appellant.

UNPUBLISHED
December 21, 2010

No. 291912
Jackson Circuit Court
LC No. 08-004938-FH

Before: MURPHY, C.J., and METER and GLEICHER, JJ.

PER CURIAM.

Defendant appeals as of right following his convictions by a jury of breaking and entering, MCL 750.110, and receiving and concealing stolen property, MCL 750.535(3)(a). Defendant was sentenced as a fourth-offense habitual offender, MCL 769.12, to 30 to 180 months' imprisonment for each count, to be served concurrently with each other and consecutively to time imposed for his parole violation. We affirm.

On appeal, defendant argues that the prosecutor improperly impeached him pursuant to MRE 609 when the prosecutor referred to a crime for which defendant had been charged but not convicted. We agree that the prosecutor's question was improper but find that, because defendant failed to preserve the issue by objecting on the pertinent basis during cross-examination, the issue must be reviewed for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). For a plain error to have affected defendant's substantial rights, the error must have been prejudicial, meaning it must have affected the outcome of the case. *People v Jones*, 468 Mich 345, 356; 662 NW2d 376 (2003).

Under MRE 609, a witness's credibility may be impeached with prior convictions. *People v Nelson*, 234 Mich App 454, 460; 594 NW2d 114 (1999). However, absent certain exceptions, a witness may generally not be impeached with prior arrests or charges that did not result in convictions. *People v Layher*, 464 Mich 756, 766-767; 631 NW2d 281 (2001); *People v Falkner*, 389 Mich 682, 695; 209 NW2d 193 (1973). Nor may a witness be questioned about higher original charges that did not result in a conviction, whether the charges were reduced by plea or at trial. *Falkner*, 389 Mich at 695.

Defendant's presentence investigation report reveals that he was charged with two counts of burglary in Hillsdale County on January 13, 1998. However, defendant ultimately pleaded guilty to only one count of attempted second-degree home invasion in connection with these

incidents. It would appear, then, that the prosecutor, in referring to the Hillsdale incidents, mistakenly questioned defendant about a charge for which he was not convicted. Nevertheless, defendant has failed to show that the error was prejudicial or affected the outcome of his case. Defendant volunteered his extensive criminal background at the beginning of his direct testimony. Defendant did not mention the entire background to simply "beat the prosecution to it." Indeed, that could not have been the case, given that defendant admitted to crimes that would have been inadmissible because of their remoteness in time, and given that the trial court ruled before trial that only a limited number of prior convictions would be admitted. Defendant freely stated that he had 13 prior felonies. His testimony was primarily in narrative form and rambling. Many of his answers to even his own attorney's questions were nonresponsive.

The case rested solely on the credibility of the witnesses. Defendant argued that he had no idea that the model trains in question were stolen until after he became involved and that, once he realized that his accomplice, Michael Nichols, had stolen the trains, he immediately returned them to Nichols. For his part, Nichols implicated defendant in the entire process. Nichols testified that the theft was defendant's idea and that, although defendant did not actually break and enter into the trailer, defendant helped to transport Nichols and the trains. It was within the province of the jury to decide whom to believe. *People v McKinney*, 258 Mich App 157, 165; 670 NW2d 254 (2003). Given all the information the jury had, it is doubtful that the prosecutor's question regarding a prior offense for which defendant was charged but not convicted would have swayed the jury. Because defendant has failed to demonstrate that the outcome of the trial would have been different absent the prosecutor's error, he has not demonstrated plain error requiring reversal.

Defendant makes a similar argument on appeal regarding the prosecutor's questioning about a home invasion in Ingham County that was actually an *attempted* home invasion. However, once again we cannot find that questioning about a "home invasion" versus an "attempted home invasion" affected defendant's substantial rights, especially when the jury had already heard about defendant's extensive felony record.

Affirmed.

/s/ William B. Murphy
/s/ Patrick M. Meter
/s/ Elizabeth L. Gleicher