

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
December 3, 2013

v

JEROME YONTA BARBER,

Defendant-Appellant.

No. 311238
Wayne Circuit Court
LC No. 10-010880-FC

Before: FORT HOOD, P.J., and SAAD and BORRELLO, JJ.

PER CURIAM.

A jury convicted defendant of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(c) (sexual penetration under circumstances involving the commission of any other felony); kidnapping, MCL 750.349 (restraint with the intent to engage in CSC); and larceny from a person, MCL 750.357. Defendant was sentenced to 25 to 40 years' imprisonment for the CSC I conviction, 25 to 40 years' imprisonment for the kidnapping conviction, and 8 to 20 years' imprisonment for the larceny from a person conviction. Defendant appeals his convictions. For the reasons stated below, we affirm.

I. FACTS AND PROCEDURAL HISTORY

On July 31, 2010, the 16-year-old victim walked to a gas station that was located four blocks away from her home. While she was at the gas station, the victim encountered defendant, a man she did not know. The victim testified that defendant approached her and asked her several times to go home with him. The victim ignored defendant's advances and began walking home. Defendant followed the victim and continued to ask her to come home with him. Although the victim told defendant that she was too young for him, defendant informed her that she was young but "ready." When the victim was two blocks away from her home, defendant "grabbed" her by the left arm and "forced" her into an alley. The victim testified that she tried to get away once they reached the alley, but defendant impeded her attempts by holding her by the neck for two minutes. Defendant told the crying victim to be quiet, put his hand over her mouth, undressed her, and penetrated her vagina with his penis. During the assault, the victim dropped her cigarettes and cellular telephone onto the ground. Defendant took the items after the assault. When the victim returned home, her sister-in-law witnessed her collapse to the ground, curl up into a ball, and cry.

The police were contacted and the victim was examined several hours after the assault by a sexual-assault nurse, who testified that the victim suffered an abrasion on her labia majora, bruises on her cervix and vaginal wall, and an actively “bleeding tear” on her vaginal wall. The nurse testified that, in her experience, victims of sexual assault are physically injured about half of the time. Evidence collected from the victim during the examination was placed it into a rape kit, and a DNA analysis was performed. Sperm cells on the victim’s vaginal swab matched the DNA from defendant’s buccal swab.

At trial, defendant admitted to stealing the victim’s cellular telephone. However, he alleged that the victim told him that she was 19 years old and she agreed to go into the alley with him to have consensual intercourse. After the jury convicted defendant, he moved for a new trial, and his motion was denied after the trial court found that any error was harmless in light of the overwhelming evidence of defendant’s guilt.

Defendant argues on appeal that the trial court erred by denying his motion for a new trial. Specifically, he asserts that the trial court abused its discretion by: (1) admitting evidence of his prior fourth-degree criminal sexual conduct (CSC-IV) conviction; (2) denying his motion for a mistrial; and, (3) admitting evidence of his prior conviction for receiving and concealing a stolen automobile under MCL 750.535(7). We review a trial court’s decision to grant or deny a new trial for an abuse of discretion, and address each of these claims in turn. *People v Terrell*, 289 Mich App 553, 558-559; 797 NW2d 684 (2010).

II. ADMISSIBILITY OF PRIOR CSC-IV CONVICTION

A trial court’s decision to allow impeachment by evidence of a prior conviction is reviewed for an abuse of discretion. *People v Bartlett*, 197 Mich App 15, 19; 494 NW2d 776 (1992). A preserved trial error in admitting or excluding evidence is not grounds for reversal unless, after an examination of the entire cause, it affirmatively appears that it is more probable than not that the error affected the outcome of the trial. *People v King*, 297 Mich App 465, 472; 824 NW2d 258 (2012). It is within the trial court’s discretion to admit, at any time during the trial, evidence of a defendant’s prior convictions, if the evidence was offered for some proper purpose other than to impeach the defendant’s credibility. *People v Taylor*, 422 Mich 407, 414; 373 NW2d 579 (1985).¹

Before defendant testified at trial, the trial court ruled, over defendant’s objection, that his prior CSC-IV conviction would be admissible if defendant “opened the door” during his testimony. During direct-examination, defendant testified that he and the victim engaged in consensual intercourse. On cross-examination, he reiterated that he did not force the victim to have intercourse, and the prosecutor asked “you would never touch a woman against her will, would you?” Defendant stated “no” in response. The prosecutor then asked defendant if he pled guilty to CSC-IV the day before, and defendant acknowledged that he had. The trial court then admitted the prior conviction as evidence.

¹ Notwithstanding a ruling to exclude such evidence under MRE 609.

This prior conviction was not used to impeach defendant's credibility in general. Rather, it was introduced for the specific purpose of rebutting his assertion that he would not touch a woman against her will. In any event, the probative value of discrediting defendant's assertion—that he would not touch a woman against her will—was not substantially outweighed by its prejudicial effect. In addition, we note that the trial court gave a cautionary instruction to the jury, stressing that defendant's past conviction could only be used for the limited purpose of rebutting his on-the-stand assertion.

Accordingly, the trial court did not abuse its discretion by admitting the contested evidence. *Id.* Were we to consider this an error, the error is nonetheless harmless because of the overwhelming evidence of guilt. *King*, 297 Mich App at 472.

Defendant's other argument relating to the CSC-IV conviction—namely, that the prosecutor improperly questioned him on a collateral matter during cross-examination, and then used his response to introduce evidence of his CSC-IV conviction—is equally unconvincing. A cross-examiner may question a witness on a collateral matter. *People v LeBlanc*, 465 Mich 575, 590; 640 NW2d 246 (2002). The cross-examiner is bound by the witness's response and may not introduce extrinsic evidence to rebut it. *Id.* Here, the prosecutor took defendant's answer as he provided it and did not attempt to introduce extrinsic evidence concerning his prior CSC-IV conviction. As such, the prosecutor's conduct was proper and defendant's argument has no merit.²

III. MOTION FOR MISTRIAL

After the prosecution questioned defendant about his prior CSC-IV conviction, the defense objected and moved for a mistrial. Defendant argued that the trial court's failure to exclude the conviction "tainted" the jury. The trial court denied defendant's motion.

We review a trial court's denial of a motion for mistrial for an abuse of discretion. *People v Alter*, 255 Mich App 194, 200; 659 NW2d 667 (2003). The trial court did not abuse its discretion by admitting evidence of defendant's prior CSC-IV conviction for the limited purpose of rebutting his testimony. Accordingly, the trial court did not abuse its discretion by denying defendant's motion for a mistrial. *Id.*

² We note that even if the trial court improperly allowed the prosecution's question regarding the prior CSC-IV conviction, defendant is not entitled to a new trial. To receive a new trial, the supposed error must "undermine the reliability of the verdict. In other words, the effect of the error is evaluated by assessing it in the context of the untainted evidence to determine whether it is more probable than not that a different outcome would have resulted without the error." *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999) (internal citations and quote marks omitted).

Here, there is ample evidence unrelated to defendant's prior CSC-IV conviction that implicates defendant: the testimony of the victim and her friends. The jury clearly found this testimony credible.

IV. ADMISSIBILITY OF PRIOR THEFT CONVICTION

The trial court's decision to allow impeachment by evidence of a prior conviction is not reversed absent an abuse of discretion. *Bartlett*, 197 Mich App at 19. A trial court's decision on a close evidentiary question ordinarily cannot be an abuse of discretion. *People v Ackerman*, 257 Mich App 434, 438; 669 NW2d 818 (2003). Further, a preserved trial error in admitting or excluding evidence is not grounds for reversal unless, after an examination of the entire cause, it affirmatively appears that it is more probable than not that the error affected the outcome of the trial. *King*, 297 Mich App at 472.

A witness's credibility may be impeached with evidence of a prior conviction if MRE 609's requirements are satisfied. *People v Meshell*, 265 Mich App 616, 634; 696 NW2d 754 (2005). When the prior conviction is one of theft and the witness is the defendant himself, a prior conviction will only be admissible if the probative value outweighs the prejudicial effect as determined under the balancing test of MRE 609(a)(2)(B). *Id.* at 635.

The crime of receiving and concealing a stolen motor vehicle contains an element of theft, *People v Johnson*, 474 Mich 96, 103; 712 NW2d 703 (2006), and prior convictions involving theft are moderately probative of trustworthiness, *People v Allen*, 429 Mich 558, 605; 420 NW2d 499 (1988). The fact that defendant's prior conviction was only three years old increases its probative value. See *Meshell*, 265 Mich App at 636. Further, the prior conviction was dissimilar to two of defendant's three charged offenses, thus lessening the prejudicial effect. See *Allen*, 429 Mich at 606. The prejudicial effect of admitting the prior theft conviction thus did not outweigh its probative value.

Accordingly, the trial court did not abuse its discretion by admitting defendant's prior theft conviction into evidence. *Bartlett*, 197 Mich App at 19. Moreover, any error in permitting the introduction of this evidence is harmless in light of the overwhelming evidence of guilt. *King*, 297 Mich App at 472. Therefore, the trial court did not abuse its discretion by denying defendant's motion for a new trial with respect to defendant's prior theft conviction. *Terrell*, 289 Mich App at 558-559.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Henry William Saad
/s/ Stephen L. Borrello