

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
December 19, 2013

v

KENNETH RICO PRINGLE,

Defendant-Appellant.

No. 311962
Wayne Circuit Court
LC No. 12-002585-FC

Before: WILDER, P.J., and FORT HOOD and SERVITTO, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of kidnapping, MCL 750.349; three counts of first-degree criminal sexual conduct, MCL 750.520b (multiple variables); second-degree criminal sexual conduct, MCL 750.520c (multiple variables); armed robbery, MCL 750.529; felon in possession of a firearm, MCL 750.224f; and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced, as a fourth habitual offender, MCL 769.12, to 50 to 75 years' imprisonment for kidnapping, 50 to 75 years' imprisonment for each of the three counts of first-degree criminal sexual conduct, 50 to 75 years' imprisonment for second-degree criminal sexual conduct, 50 to 75 years' imprisonment for armed robbery, 50 to 75 years' imprisonment for felon in possession of a firearm, and two years' imprisonment for felony-firearm. We affirm.

I. FACTS

Defendant's convictions stem from an armed robbery, kidnapping, and rape that occurred in Detroit on February 12, 2010. The victim testified that while walking home from the bus stop, defendant approached her, pointed a gun at her and robbed her. He then ordered her to an abandoned home, where he raped her. Defendant, however, testified that he had met the victim some months prior and that they had consensual intercourse on the night of the incident. Prior to trial, defendant moved to preclude the cross-examination of defendant regarding his prior convictions for armed robbery in 1995 and attempted uttering and publishing in 2007. The trial court denied defendant's motion. Thereafter, at trial, on direct examination, defense counsel asked defendant if he had been convicted of any felonies in the past to which defendant responded by admitting that he had been convicted of armed robbery in 1995 and attempted uttering and publishing in 2007.

II. IMPEACHMENT BY PRIOR CONVICTION

Defendant contends that the trial court abused its discretion when it ruled that defendant's prior conviction for armed robbery could be admitted for impeachment purposes, and that this abuse of discretion constitutes error requiring a new trial. We disagree.

A. WAIVER OF THE ISSUE

"Where a prosecutor would have the option of impeaching the defendant with a prior conviction, the defendant may not mitigate the damage by fronting the conviction and then argue on appeal that the admission of the testimony was error." *People v Rodgers*, 248 Mich App 702, 716; 645 NW2d 294 (2001). In *Ohler v United States*, 529 US 753, 759; 120 S Ct 1851; 146 L Ed 2d 826 (2000), the Supreme Court stated, "[t]he defendant must choose whether to introduce the conviction on direct examination and remove the sting or to take her chances with the prosecutor's possible elicitation of the conviction on cross-examination." The *Ohler* Court determined that the defendant, by offering the testimony herself, deprived the government its right to decide whether to actually use the prior conviction against her. *Id.* at 758. The Court held that appellate review is only applicable after the government has exercised its option to elicit testimony regarding a defendant's prior convictions and that "a defendant who preemptively introduces evidence of a prior conviction on direct examination may not on appeal claim that admission of such evidence was error." *Id.* at 760.

In the instant case, in a pretrial motion, defendant sought to preclude the cross-examination of defendant with evidence of his prior armed robbery conviction. The trial court denied defendant's motion to preclude this evidence. During direct examination, defense counsel preemptively raised the issue of defendant's prior armed robbery conviction before the prosecution had the opportunity to cross-examine defendant on this issue. Therefore, in applying the rule of law set forth in *Ohler*, which was followed by this Court in *Rodgers*, defendant has waived his right to review the trial court's decision to admit the prior armed robbery conviction. In any event, in reviewing the merits of defendant's claim on appeal, we conclude that a new trial is not warranted.

B. ABUSE OF DISCRETION

This Court reviews for an abuse of discretion a trial court's determination whether a prior conviction involving a theft component may be used to impeach a defendant. *People v Meshell*, 265 Mich App 616, 634; 696 NW2d 754 (2005). A trial court abuses its discretion when it selects an outcome that does not fall within the range of reasonable and principled outcomes. *People v Young*, 276 Mich App 446, 448; 740 NW2d 347 (2007).

Prior convictions may be used to impeach a witness's credibility if the requirements of MRE 609 are satisfied. *Meshell*, 265 Mich App at 634. MRE 609 provides, in relevant part:

(a) General rule. 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*. [Emphases added.]

The prior conviction at issue is defendant's 1995 armed robbery conviction. Since armed robbery contains an element of theft, (see *People v Chambers*, 277 Mich App 1, 7; 742 NW2d 610 (2007)), and is punishable by imprisonment in excess of one year, MCL 750.529, MRE 609(a)(2) is applicable.

In making its decision regarding whether it should admit the prior theft crime conviction under MRE 609(a)(2), the trial court is first required to determine that the prior theft crime conviction has "significant probative value on the issue of credibility." *People v Snyder*, 301 Mich App 99, 103; 835 NW2d 608 (2013). After the court determines that the prior theft crime conviction has "significant probative value on the issue of credibility," if the witness is the defendant in a criminal trial, the court must further determine whether the "probative value of the evidence outweighs its prejudicial effect." *Id.*

In making a determination regarding the probative value of a prior conviction, "the court shall consider only the age of the conviction and the degree to which a conviction of the crime is indicative of veracity." MRE 609(b). When considering the age of the conviction, in general, the older the conviction, the less probative it is. *Snyder*, 301 Mich App at 106. In assessing the prejudicial effect, the trial 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." MRE 609(b).

In the instant case, although the armed robbery occurred more than 15 years before trial, it satisfied the 10-year time requirement of MRE 609(c) because defendant was not released from parole until 2008. The fact that defendant was released from parole only two years prior to the occurrence of the most recent crimes heightens the probative value of the prior conviction. Although armed robbery is primarily an assaultive crime and it has a lower probative value on the issue of credibility than does other theft offenses, see *People v Allen*, 429 Mich 558, 611; 420 NW2d 499 (1988), the prior conviction still involves an element of theft and carries significant probative value for the jury to determine defendant's veracity. *Id.*

In assessing the prejudicial effect, the prior armed robbery conviction is similar to one of the charged offenses, that being armed robbery. It is completely dissimilar to the other charged offenses, which include kidnapping, three counts of criminal sexual conduct in the first degree, and one count of criminal sexual conduct in the second degree and the main focus of the trial was on the criminal sexual conduct and kidnapping charges, rather than armed robbery. If this trial was focused solely on an armed robbery charge that involved a credibility contest between

defendant and the victim, the introduction of this prior conviction would be more prejudicial. However, in light of the other charges involved in this case, it reduces the prejudicial effect of the prior conviction. Also, the court's pretrial ruling to deny defendant's motion to preclude the prior conviction seemed to have no effect on defendant's decision to testify because he did, in fact, testify.

To further reduce the prejudicial effect, the trial court issued a limiting instruction to the jury. Generally, jurors are presumed to follow their instructions, and instructions are presumed to cure most errors. *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003). The trial court instructed the jurors to consider the prior conviction for the purpose of assessing whether they believed defendant's testimony. This instruction reduced the prejudicial effect of the prior conviction because the jury was asked to use the conviction solely to assess the credibility of defendant as a witness. Thus, the trial court's decision to admit the prior conviction did not fall outside of the range of reasonable and principle outcomes and it did not abuse its discretion in admitting the evidence.

Defendant also asserts that the trial court did not adequately analyze and balance the necessary factors on the record. According to MRE 609(b), the trial court must articulate on the record its analysis of the factors in subsection (b). However, the trial court's failure to articulate on the record its analysis of these factors does not require reversal if the trial court was aware of the pertinent factors and of its discretion. *Meshell*, 265 Mich App at 638.

In deciding to allow the admission of the prior conviction, the trial court reasoned as follows:

And the armed robbery, although the parole time is within the realm of the time, the Court does have to consider carefully the probative value versus the prejudicial effect; however, the prejudicial effect of the prior conviction is an issue in every single case.

And the problem is that although certainly it's not helpful to the Defense, but still the fact finder has to hear and listen to and is given an instruction to listen to the witnesses and their testimony. And to tie the hands of the prosecutor as far as cross-examination on issues of truth and veracity would not be giving an honest picture.

I do not feel that there has been a sufficient showing that this conviction is more prejudicial than probative or that the prosecutor should not be allowed to use it in cross-examination. It would be used only in cross-examination if it were used at all. And the Court thus in reviewing the motion denies the motion.

It is clear that the trial court addressed several of the pertinent factors, including the probative value of the conviction, the age of the conviction, the weighing of probative value versus prejudicial effect, and its discretion to admit or exclude the evidence. Therefore, even though it did not articulate its analysis in elaborate detail on the record, it seems apparent that the trial court was aware of the factors involved and its discretion.

Finally, even if the trial court abused its discretion in admitting the prior conviction, defendant is not entitled to a new trial. Where a preserved, non-constitutional error has occurred, the burden is on the defendant to demonstrate that “after an examination of the entire cause, it shall affirmatively appear that the error asserted has resulted in a miscarriage of justice.” *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999). Accordingly, reversal is only required if such an error is prejudicial and it is more probable than not that a different outcome would have resulted without the error. *Id.*

Although this case involved a credibility contest between defendant and the victim, other evidence presented at trial by the prosecution weighed heavily against defendant’s credibility. Not only was defendant impeached with the armed robbery conviction, he was also impeached with his 2007 attempted uttering and publishing conviction when he admitted to the offense on direct examination. Furthermore, the victim’s boyfriend corroborated portions of the victim’s testimony. He confirmed that victim had spoken to him on her cell phone and told him that she was getting on the bus to come home. He also attested to the fact that the victim looked like a ghost and was hysterical when she finally arrived home. The boyfriend’s mother also testified that the victim was crying and screaming that somebody had raped her when she got home. Despite defendant’s claim that the intercourse was consensual, the victim suffered injuries to her anal sphincter. Defendant also claimed he had consensual intercourse with the victim on a prior occasion and that they knew each other; however, the victim could not pick defendant out of a lineup and defendant did not present any corroborating evidence that they knew each other previously. The strong DNA match, the injuries to the victim, and the corroborating testimony all weigh heavily in favor of the victim’s testimony.

Therefore, defendant failed to meet the burden of proving that any error that may have occurred resulted in a miscarriage of justice. In light of the vast majority of evidence against defendant and the limiting instructions to the jury, as discussed above, it appears that no miscarriage of justice occurred, and that the introduction of the prior conviction was not outcome determinative.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Karen M. Fort Hood
/s/ Deborah A. Servitto