

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JIMMY LEE HARRISON a/k/a
JAMES EDWARDS,

Defendant-Appellant.

UNPUBLISHED
October 18, 1996

No. 182990
LC No. 94-050464

Before: Saad, P.J. and Holbrook and G. S. Buth,* JJ

PER CURIAM

The jury convicted defendant of attempted breaking and entering of an occupied dwelling, MCL 750.110; MSA 28.305, and possession of burglar's tools, MCL 750.116; MSA 28.311. Subsequently, defendant pleaded guilty to being an habitual offender, third offense, MCL 769.11; MSA 28.1083. He appeals and we affirm.

I.

Defendant argues that the trial court's instructions were improper, but because he failed to object to the instructions, his claim requires reversal only if the alleged erroneous instructions amounted to manifest injustice. *People v Chatfield*, 170 Mich App 831, 835; 428 NW2d 788 (1988). Because directed verdicts of guilt in criminal jury trials are forbidden by the Sixth and Fourteenth Amendments, appellate courts will reverse if an instruction amounts to a directed verdict or otherwise improperly invades the province of the jury. *People v Gaydosh*, 203 Mich App 235, 237-238; 512 NW2d 65 (1995). An instruction must not exclude from jury consideration material issues, defenses or theories if there is evidence to support them. *Id.* An instruction may not remove from the jury the factual determination of an element of the crime. *Id.*

*Circuit judge, sitting on the Court of Appeals by assignment.

We find that the trial court's comment that "[the lawyers are] paid to represent a client and that's fine," did not undermine the essential fact-finding function of the jury. We further find that the trial court's unrelated other comment "bearing in mind, of course, [defendant] has a direct interest in the way this lawsuit comes out" when discussing defendant's testimony, did not undermine the jury's fact-finding function. The trial court instructed the jury that it could give defendant's testimony whatever consideration it wanted. Because the trial court's instruction did not invade the province of the jury by excluding consideration of material issues, defenses or theories, no manifest injustice occurred. *Id.* It follows that defendant's related argument, that defense counsel was ineffective for failing to object to the trial court's instructions, lacks merit.

II.

Defendant also contends that the trial court abused its discretion by allowing the prosecutor to introduce evidence of defendant's prior conviction for receiving and concealing stolen property over \$100. We disagree.

A witness's credibility may be impeached with prior convictions if the convictions satisfy the criteria set forth in MRE 609, which states 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.

(b) Determining Probative Value and Prejudicial Effect. 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 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.

(c) Time Limit. Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date.

Here, defendant's prior conviction for receiving and concealing stolen property over \$100 was less than ten years old. This increases the probative value. However, the conviction was also for a crime dissimilar to the charged offense of attempted breaking and entering, which tended to reduce the prejudicial effect. While there may have been some chilling effect on defendant's choice to testify, admission of the prior conviction does not appear to have had a major effect on this decision. Although there may have been some prejudice arising from defendant's impeachment with this evidence, the trial court did not abuse its discretion in determining that the probative value outweighed the prejudicial effect.

III.

Defendant also asserts that the prosecutor engaged in misconduct which denied defendant a fair trial. However, because defendant failed to object to the prosecutor's comments and questions, review is precluded unless failure to review the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). After reviewing the remarks in context, we find no manifest injustice. Furthermore, assuming the prosecutor's questions and comments were improper, they could have been cured had a timely objection been made. *Stanaway, supra*.

Similarly, on defendant's second claim of prosecutorial misconduct, the prosecutor did not attempt to mislead the jury, but rather addressed an argument made by defense counsel. Remarks which may otherwise be improper do not require reversal when they address issues raised by defense counsel. *People v King*, 210 Mich App 425, 434; 534 NW2d 534 (1995). Because the prosecutor was addressing an issue raised by defense counsel, counsel was not required to object to his statement. Therefore, defendant was not denied his right to effective assistance of counsel at trial.

In light of our disposition of defendant's prosecutorial misconduct claims, defendant's derivative claim of ineffective assistance of counsel lacks merit. *Stanaway, supra*.

Affirmed.

/s/ Henry William Saad
/s/ Donald E. Holbrook, Jr.
/s/ George S. Buth