

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LARRY BRIAN YEARGIN,

Defendant-Appellant.

UNPUBLISHED

December 27, 1996

No. 184483

Recorder's Court

LC No. 94-5943-01

Before: Griffin, P.J. and T.G. Kavanagh* and D.B. Leiber,** JJ.

PER CURIAM.

Defendant was convicted following a jury trial of breaking and entering a building with intent to commit larceny, MCL 750.110; MSA 28.305. Defendant pleaded guilty of habitual offender, fourth, MCL 769.12; MSA 28.1084, and was sentenced to five to fifteen years' imprisonment. We affirm.

Defendant argues that the trial court abused its discretion in allowing the prosecutor to impeach him with a prior conviction for attempted receiving and concealing stolen property, MCL 750.535; MSA 28.803, MCL 750.92; MSA 28.287, because the evidence was more prejudicial than probative.

We will not reverse a trial court's decision to allow impeachment by evidence of a prior conviction absent an abuse of discretion. *People v Bartlett*, 197 Mich App 15, 19; 494 NW2d 776 (1992). Further, even where the introduction of evidence of a prior conviction is improper, the error is harmless in a case where there is overwhelming evidence of guilt. *Id.*

Prior to trial, defense counsel moved to suppress defendant's prior convictions for impeachment purposes. The trial court denied the motion as to defendant's attempted receiving and concealing stolen property conviction, MCL 750.535; MSA 28.803, MCL 750.92; MSA 28.287, finding that it was not

* Former Supreme Court Justice, sitting on the Court of Appeals by assignment pursuant to Administrative Order 1996-10.

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

so similar as to warrant exclusion and noting that “that has to be weighed in terms of the effect it has on the defendant’s testifying.”¹

Crimes of theft are minimally probative and are therefore admissible only if the probative value outweighs the prejudicial effect as determined under the balancing test of MRE 609(a)(2)(B). *Bartlett, supra*, 197 Mich App at 19, citing *People v Allen*, 429 Mich 558, 595; 420 NW2d 499 (1988). For purposes of the prejudice factor, only the similarity to the charged offense and the importance of the defendant’s testimony to the decisional process would be considered. *Allen*, 429 Mich at 606. The prejudice factor escalates with increased similarity and increased importance of the testimony to the decisional process. *Id.*

We do not agree with defendant that in the instant case defendant’s prior conviction for attempted receiving and concealing stolen property was so similar to the charged crime of breaking and entering a building with the intent to commit larceny as to preclude its use for impeachment purposes under MRE 609(b). See *People v Clark*, 172 Mich App 407, 409; 432 NW2d 726 (1988). However, even assuming that the prior conviction was improperly admitted, any error was harmless in light of the overwhelming evidence of defendant’s guilt. *Bartlett*, 197 Mich App at 19.

At trial, fifteen year old Nichole Ford testified that on the morning of the date in question she was home from school, alone, with the chicken pox and that she heard someone opening the garage. She looked out the window and observed a man pull her uncle’s lawnmower away, and lift it over the backyard gate. Nichole testified that the man then jumped over the gate and proceeded down the alley, and that she called her mother at work and then the police. Nichole described the clothes the perpetrator was wearing to the police and identified defendant at the preliminary examination and at trial. Nichole’s mother, Augustine Ford, testified that she had closed the garage door before leaving for work that morning and that when she returned home after receiving her daughter’s call at work, the lock on the garage door had been broken. After police spoke to Nichole, they did an area search and found defendant about two blocks away pushing a lawnmower.

Defendant next argues that the trial court abused its discretion in sentencing him to five to fifteen years’ imprisonment where the sentence was based solely on his prior record.

The record does not support defendant’s argument. The trial court considered defendant’s extensive criminal history and his potential for rehabilitation, and noted that he had been paroled shortly before committing the instant offense. The trial court acted reasonably and did not abuse its discretion. *People v Cervantes*, 448 Mich 620, 627; 532 NW2d 831 (1995). Moreover, the sentencing guidelines, which in this case were calculated at eighteen to forty-two months, do not apply to habitual offenders. *Id.* at 625.

Affirmed.

/s/ Richard A. Griffin
/s/ Thomas G. Kavanagh
/s/ Dennis B. Leiber

¹ Defendant testified at trial.