STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RICHARD MICHAEL PHILLIPS,

Defendant-Appellant.

UNPUBLISHED

No. 176569

Macomb Circuit Court
LC No. 93-002237

Before: Smolenski, P.J., and Holbrook, Jr., and F.D. Brouillette,* JJ.

F. D. BROUILLETTE, J. (dissenting).

The defendant in this case took the stand to testify in his own defense. His attorney asked him, and he responded as follows:

Q. Have you ever been convicted of a crime, sir?

A. Yes.

Defendant had, in fact, been convicted of numerous criminal offenses. Over defense counsel's objection the prosecutor on cross-examination of the defendant was allowed to impeach the defendant with five prior convictions. This testimony was allowed over the objection of defense counsel because the court found that the defendant, by his answer, had indicated he had only been convicted of one criminal offense when in fact there has been multiple criminal offenses. Allowing the evidence of the five previous convictions was error and I agree with the majority in that regard. I do not agree that it was harmless error. As a result of the erroneous allowance of this evidence the jury was informed of five previous convictions which had occurred more than ten years before this trial and thus, under MRE 609(c), were time-barred. The jury was informed that the defendant had been convicted of concealing stolen property; attempted larceny from a motor vehicle; burglary; larceny from a motor vehicle; and forgery.

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

Not all error in a trial warrants reversal of the conviction. If, even without the error, reasonable jurors would have found the defendant guilty beyond a reasonable doubt, the error is harmless. *People v Coleman*, 210 Mich App 1; 532 NW2d 885 (1995).

The credibility of the defendant contrasted with the credibility of the complaining witness was the issue in this case. I am not convinced that the result might not have been different but for the error that occurred in allowing into evidence five serious convictions that should not have been allowed into evidence.

The trial court allowed into evidence testimony from three other young women about uncharged improper sexual conduct in which they claimed the defendant had engaged. The court exercised its discretion under *People v VanderVliet*, 444 Mich 52; 508 NW2d 114 (1993), in allowing that testimony into evidence. The majority opinion finds that the testimony of other uncharged sexual contact the defendant had with other females was appropriate. They find that the other bad acts testimony was appropriate to show that the defendant did not act with "innocent intent toward the complainant." The testimony of the complainant was that the defendant touched her in private areas under her clothing, touched her breasts, asked her to remove her pants, and inserted his finger into her vagina. The jury was called upon to believe either the defendant or the complainant and if they believed the complainant it would be hard to imagine the jury could find an innocent intent. The justification for allowing the other bad acts testimony, even though not an abuse of discretion, was minimal at best. Even though the allowance of such testimony has a tendency to create a "trial within a trial" and I would have been reluctant to allow that evidence, I cannot say that the trial judge abused his discretion. However, the judge's exercise of discretion in that regard when coupled with the improper admission of stale convictions makes the admission of those stale convictions much more damning. A jury might well believe that a defendant "must be guilty" if he did the same things to other young women and also had been convicted of those offenses which were improperly admitted. I believe that to be a likely result even if cautionary instructions were given. I would reverse the defendant's conviction and remand for a new trial.

/s/ Francis D. Brouillette