

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHNNIE LEE HARSTEN,

Defendant-Appellant.

UNPUBLISHED

May 2, 1997

No. 191060

Oakland Circuit Court

LC No. 95-137601-FC

Before: Saad, P.J., and Neff and Jansen, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions of two counts of first-degree criminal sexual conduct, MCL 750.520b(1)(e); MSA 28.788(2)(1)(e), and one count of habitual third offender, MCL 769.11; MSA 28.1083. The trial court sentenced defendant to ten to thirty years on each count of criminal sexual conduct, to be served concurrently. Defendant's convictions of first-degree criminal sexual conduct are affirmed, but we remand to the trial court for correction of the judgment of sentence regarding defendant's conviction of habitual third offender.

On appeal, defendant first contends that the trial court erred by allowing the prosecutor to attempt to impeach the testimony of defendant and witness Nathan Beeler through the improper admission of prior convictions, and improper questioning about the details of the prior convictions. We review a trial court's decision to admit evidence for abuse of discretion. *People v Watkins*, 176 Mich App 428, 430; 440 NW2d 36 (1989).

A witness's credibility may be impeached with prior convictions if the convictions satisfy the criteria set forth in MRE 609. Here, the prosecutor attempted to attack the credibility of defendant by introducing evidence that defendant had previously been convicted of the crime of receiving and concealing stolen property over one hundred dollars. In determining admissibility under MRE 609, the trial court's first task is to determine whether the crime contains an element of dishonesty or false statement. *People v Allen*, 429 Mich 558, 605; 420 NW2d 499 (1988). If it is a crime involving dishonesty or false statement, it is admitted without further consideration. *Id.* We have previously defined the crime of receiving and concealing stolen property as a crime bearing on the issue of honesty.

People v Coward, 111 Mich App 55, 66; 315 NW2d 144 (1981). Therefore, the trial court did not abuse its discretion in admitting defendant's prior conviction.

However, defendant also contends that even if the prior conviction was admissible, the prosecutor improperly questioned defendant about the details of his prior conviction, which is prohibited by the Michigan Supreme Court's ruling in *People v Rappuhn*, 390 Mich 266, 274-275; 212 NW2d 205 (1973). In *Rappuhn*, the questioning focused on the duration of the defendant's punishment and where he served his time. *Id.*, pp 271-273. Here, on the other hand, the prosecutor's questioning merely attempted to establish the fact that defendant had committed the prior felony, as evidenced by the fact that once the prosecutor established that defendant had committed the prior crime, she stated she would no longer fight over the date of the conviction, and ended her cross examination on the subject.

Concerning the prosecutor's attempt to impeach Nathan Beeler's testimony through the use of a prior conviction, the prosecutor attempted to attack Beeler's credibility by introducing evidence that he had previously been twice convicted of the crime of robbery. As the robbery convictions clearly contained an element of theft as opposed to dishonesty or false statement, the trial court's first task was to determine if the evidence had significant probative value on the issue of credibility. MRE 609(2)(B). The trial court specifically stated that it was entertaining a balancing test on the probative value of the evidence. Therefore, the lower court did not abuse its discretion in admitting the prior conviction.

However, defendant again contends that even if the prior conviction was admissible, the prosecutor created reversible error when she improperly cross examined Beeler about the details of his sentence and confinement for that offense. We find that although the prosecutor did question Beeler about the length of his punishment for the prior conviction, defense counsel did not object to the questioning on the basis of irrelevant and immaterial evidence. As in all cases where a claim is made that the testimony is irrelevant, an objection must be made at the time the testimony is elicited or the issue is not preserved for appellate review absent manifest injustice. *People v Grant*, 445 Mich, 535, 546-547; 520 NW2d 123 (1994). As the thrust of the prosecutor's questioning was apparently to show Beeler's relationship with defendant since the alleged criminal sexual conduct and was of limited duration, it does not rise to the level of manifest injustice.

Defendant next contends that the trial court improperly admitted the hearsay statements made by the complainant, Melissa Callender, to her mother, under MRE 803(2) as excited utterances. We disagree. We review a trial court's decision to admit evidence for abuse of discretion. *Watkins, supra*, p 430.

A statement may be admitted under MRE 803(2), as an excited utterance, if it arises out of a startling occasion, is made before there has been time to contrive and misrepresent, and relates to the circumstances of the startling occasion. *People v Gee*, 406 Mich 279, 282; 278 NW2d 304 (1979). In addition, as it is the startling event that lends the utterance its reliability, care must be taken that the excited utterance is not used to substantiate the event from which the utterance arose. *People v Burton*, 433 Mich 268, 295; 445 NW2d 133 (1989). Defendant contends here that there was no

independent proof of the specific startling event to which the hearsay statements purportedly relate aside from the statements themselves. However, the complainant herself testified at trial, establishing independent proof of the startling event. The trial court did not abuse its discretion in admitting the statements.

Defendant also asserts that the judgment of sentence should be corrected as it mistakenly lists a conviction and sentence for defendant as an habitual third offender that he was never convicted of nor sentenced for. We agree. A review of the record indicates that the trial court did not address defendant's charge of habitual third offender. However, it is also evident from defendant's sentence that although the judgment of sentence lists defendant as convicted of the charge by a plea of guilty, his sentence was not enhanced. In fact, defendant was sentenced on his convictions of first-degree criminal sexual conduct at the low end of the guidelines to a minimum of ten years on each count, to be served concurrently. Therefore, as clerical mistakes in judgments may be corrected by the lower court by order of this Court under MCR 6.435(D) and MCR 7.208(A), we remand the case to the lower court to correct the clerical error on the judgment of sentence and remove the entry of defendant's conviction on the charge of habitual third offender.

Finally, defendant contends that the trial court erred in its instructions to the jury. However, because defendant did not object to the instructions, this issue has not been properly preserved and we will not review the issue on appeal.

Affirmed as to defendant's convictions of first-degree criminal sexual conduct, but remanded to the trial court to correct the judgment of sentence consistent with this opinion.

/s/ Henry W. Saad
/s/ Janet T. Neff
/s/ Kathleen Jansen