STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JERRY STEWART,

Defendant-Appellant.

UNPUBLISHED

No. 182698
Calhoun Circuit Court
LC No. 94-001248

Before: Bandstra, P.J., and Hoekstra and J.M. Batzer*, JJ.

BATZER, J. (dissenting).

Respectfully, I dissent from the majority's reversal of defendant's convictions. One of the victims, Douglas, testified that defendant and defendant's companion, Montana, bound Douglas and his girlfriend, Blackwell, with duct tape. Defendant put a handgun to Douglas' head, blindfolded him with a pillowcase, clicked the trigger and told him that the click was the only empty cylinder and talked with Montana about whether he should kill Douglas, Douglas' mentally handicapped son, and Blackwell, all of this taking place in Douglas' home. Defendant and Montana, after Montana advised defendant not to kill anyone, also talked about kidnapping Douglas' son and Blackwell as insurance against Douglas calling the police after they left. Defendant bragged to Douglas about his having forced Blackwell to perform an act of fellatio on him.

Blackwell testified that she was bound with duct tape by defendant and Montana, then was untied and taken to a bedroom by defendant and forced with defendant's gun to her head and in fear of her life to perform fellatio on defendant.

Douglas also testified that he was robbed at gunpoint by defendant and Montana who made off together with his television, microwave, compact disc player, clothes, his son's computer and watch, as well as $100.00 from a check he was forced to write to a party store where he was known. Montana took the check to the store and cashed it, Douglas testified, after Douglas had called ahead to the store to say he was sending someone with the check, all while he was held at gunpoint by defendant.

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

Other evidence corroborated the victims' testimony. Douglas called the police as soon as defendant and Montana left. A police officer testified to a "mass" of duct tape that he recovered from a trash container in the kitchen. Blackwell testified that she threw the tape in the garbage when she had gotten free. Battle Creek Police Officer, Lori Davis, who was promptly on the scene after dispatch testified that Blackwell appeared to be in shock, shaking, and crying and Douglas appeared upset and was having difficulty breathing. At one point in her interview with him, he went into the bathroom and vomited.

At the close of the People's case, the prosecution argued for the admission of defendant's prior conviction for receiving and concealing stolen property in excess of $100.00. MCL 750.535; MSA 28.803. The circuit court allowed the conviction to be admitted stating that it contained an element of dishonesty and thereby satisfied MRE 609(a)(1).

Defendant took the stand and testified, among other things, that he took no property from Douglas' house, but that Montana (who had not been apprehended at the time of trial) took a VCR, color television, computer, and keyboard, and placed them in a garbage bag that Blackwell had given Montana. Defendant testified that Douglas told Montana to take the property items because Douglas did not have $1,000.00 cash to give Montana and defendant for the purchase of illegal drugs that Douglas wanted them to plant in his ex-wife's car as a "set-up," because Douglas' ex-wife was getting all his money in child support.

The trial court had earlier excluded all evidence of defendant's three prior convictions for assault with intent to rob while armed, apparently on the basis of the age of the convictions and their similarity to some of the charged offenses.

I agree with the majority that the trial court erred in finding that defendant's 1990 conviction for receiving and concealing stolen property over $100 in value was automatically admissible under MRE 609(a)(1) as a crime of "dishonesty." Though many might think it dishonest to receive or conceal stolen property knowing it to be stolen, such is not dishonesty within the meaning of the rule. Clearly, our Supreme Court has chosen to confine the meaning of dishonesty for purposes of MRE 609(a) to *crimen falsi*, that is, crimes where there is an element of deceit or falsity. Lay persons and even the trial court may be forgiven if they were under the impression that thievery is dishonest (it is after all only dishonesty by conduct or deed, but not by word); thievery is not, as it turns out, dishonesty within the meaning of MRE 609(a), after all. *People v Allen*, 429 Mich 558; 420 NW2d 499 (1988), amended on other grounds sub nom *People v Pedrin*, 429 Mich 1216 (1988).[1]

Rather, the trial court instead of finding defendant's prior conviction admissible under MRE 609(a)(1), should have engaged in the balancing required for theft offenses under MRE 609(a)(2)(B). However, this is where I part company with the majority, for it is clear to me beyond peradventure that upon any fair and reasoned application of the MRE 609(a)(2)(B) balancing test, the probative value of the conviction for receiving and concealing stolen property over $100 far outweighed any unfair prejudice to the defendant.

In the first place, receiving and concealing stolen property knowing it to be stolen comes very close to being a *crimen falsi*. If the thief, or perhaps "fence," chooses to keep the property and holds it out as his own, the holding out is deceitful. If the thief/fence chooses to sell the property and represents to the buyer that it is his own or is held by the thief/fence on consignment or is anything but stolen, he is deceitful. Finally, if the knowing holder of stolen property chooses to conceal the property from everyone, he is not meeting his obligation to return the property to the true owner, if known, or to authorities with responsibility for stolen property. All the above possibilities are deceitful, that is, dishonest conduct; only the latter one avoids outright lying. Of course, the thief/fence could honestly say to a buyer or donee that it is stolen property and thereby knowingly aid in transforming that person into a receiver of stolen property.

In short, it is plain to me that a conviction for receiving and concealing stolen property, where *scienter* is a requisite (as it is in Michigan), is strongly indicative of veracity in a negative way. Defendant in the instant case was charged with armed robbery as well as criminal sexual conduct and felony-firearm. Receiving and concealing stolen property is not so similar to any of the charges so as to be unfairly prejudicial. While it is true that defendant's own testimony was needed to elucidate his theory of events at Douglas' home, neither do I see the impeachment of defendant by his conviction as significantly affecting his ability to present his defense. Defendant called other witnesses who corroborated aspects of his theory and presented corroborating objects into evidence. Negatives in the prosecutor's case (lack of fingerprints, lack of semen) were brought out, as well as some inconsistencies in Douglas' and Blackwell's testimony, as for example aspects relating to their being bound by tape and released. The presentation of this brief bit of impeaching evidence, a single prior conviction and not nearly the most egregious of the many of defendant, while probative of defendant's credibility, cannot be said to have been suffocating as to his presentation of his theory of defense through his own testimony on the witness stand, nor even was it otherwise unfair to that defense. It cannot reasonably be said that its admission by the trial court, had it properly applied the balancing test, would have risen to the level of an abuse of discretion.

The majority instead reverses defendant's jury tried convictions on a point of evidence law that was properly within the trial court's discretion in the first place, but erroneously was not recognized as such by the trial court, where there has been no denial of due process nor other constitutional error, nor an otherwise unfair trial. Such a reversal in my view is overly technical and not only strains the resources of the trial court and public authorities in any retrial, but also necessitates a great imposition on the victims. Were it necessary because the trial of defendant was fundamentally unfair in a constitutional sense, or were it even otherwise required for fairness, then of course such considerations of public resources and impact on victims should be put aside, but the majority presents a reversal that in my view is uncompelled either by due process or by the constraints of Michigan evidence law.

I would note that in my view, the majority is wrong even on its own terms to reverse defendant's convictions here where the trial judge did not engage in the requisite MRE 609(a)(2)(B) balancing. The proper action for the majority to take under its view of this case if it does not believe as I do that a proper balancing under MRE 609(a)(2)(B) would handily allow this conviction for

impeachment, would be to remand this case to the trial court for a proper balancing of MRE 609(a)(2)(B) factors on the record.

Finally, I would note that the admission of defendant's receiving and concealing of stolen property conviction here for impeachment purposes constitutes harmless error. Defendant took the stand and denied any intent on his part to steal the property of the victims by force of arms or otherwise. He denied any assault on the victims. It seems clear to me that at retrial not only defendant's receiving and concealing stolen property over $100 in value conviction, but also some, and possibly all, of his assault with intent to rob while armed convictions, as well as his assault with intent to do great bodily harm less than murder conviction, will be admissible under *People v Vandervliet*, 444 Mich 52; 508 NW2d 114 (1993), modified 445 Mich 1205; 520 NW2d 338 (1994), to show motive or intent or other permissible purposes. I think such convictions coming in under *Vandervliet* at retrial, even though perfectly permissible, will far outweigh in impact any effect of the impeachment by the receiving and concealing stolen property conviction that the majority finds to have been so unfairly prejudicial here.[2]

I have reviewed the other issues raised by defendant and find them to be without merit.

I would affirm.

/s/ James M. Batzer

[1] With respect to our Supreme Court's narrow definition of dishonesty as set forth in *Allen*, *supra*, and the majority's statement in the case *sub judice* that "crimes of theft are only minimally probative [of veracity]," I cannot help but recall the following narrative of New York Supreme Court Judge Harold J. Rothwax at the end of chapter one "Anything But the Truth" in his book, Guilty: The Collapse of Criminal Justice at page 34.

> When I was a fresh, young defense attorney, one of my first cases was a man who was charged with robbery. I took my job as his advocate seriously. During that period, I was visiting my mother and I proudly told her, 'I'm representing a man accused of robbery.'
>
> She frowned. 'What did he do?'
>
> 'He's *charged* with robbing an old man coming home from a store,' I told her.
>
> She looked at me with horror, and I could see the pride in her son the lawyer quickly slipping away. 'How can you represent a man like that?'
>
> I explained patiently. 'Well, Mom, he tells me he's not guilty.'
>
> My mother gazed at me pityingly, as though I was the most naï ve creature on earth, and said with a sigh, 'Son, if he can rob, he can lie.'

> I often think of my mother's words on that day. They serve as my reminder, a tickler to my conscience. Even the most sacred idea is open to scrutiny. And even as we search for truth, we all too often give credence to a lie.

[2] I would further observe that if the majority is correct in its view that reversal is required under *Allen*, in that the trial court's error was not harmless and to allow in the impeaching conviction would be an abuse of discretion, and if I am correct that one or more of defendant's convictions could be admissible under *Vandervliet*, then in my opinion *Allen* and *Vandervliet* are fundamentally at odds. The *Allen* majority thought a revision of MRE 409 particularly with respect to theft and other offenses was necessary, because in many cases of traditionally allowable impeachment with prior convictions such impeaching evidence, even with a limiting instruction, was too prejudicial, i.e. the jury was too likely to convict because defendant was "a bad man." Under *Vandervliet*, evidence of similar acts such as prior convictions can be allowed into evidence with a cautionary instruction limiting such evidence to its proper purpose, such as motive, intent, etc. MRE 404(b). While I have always thought the revised MRE 409 under *Allen* is too limiting and detrimental to the truth finding process and have thought *Vandervliet* helpful to the truth finding process, in my view these two decisions are logically at war with one another. I would urge our Supreme Court to revisit the bright-line *Allen* rule in an appropriate case and address the problem presented where a prior conviction is too prejudicial for admissibility under *Allen*, but is admissible under *Vandervliet*.