

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

KEITH ELDON FERRIER,

Defendant-Appellee.

UNPUBLISHED

September 26, 2000

No. 218482

St. Clair Circuit Court

LC No. 98-111992-FH

Before: Owens, P.J., and Jansen and R. B. Burns*, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of attempted second-degree home invasion, MCL 750.110a(3); MSA 28.305(a)(3), MCL 750.92; MSA 28.287, possession of burglary tools, MCL 750.116; MSA 28.287, and receiving and concealing stolen property in excess of \$100 (RCSP), MCL 750.535(1); MSA 28.803. Defendant was sentenced as a fourth habitual offender, MCL 769.12; MSA 28.1084, to 2½ to 10 years' imprisonment for the attempted second-degree home invasion conviction, 5 to 20 years' imprisonment for the possession of burglary tools conviction, and 2½ to 10 years' imprisonment for the RCSP conviction. Although we find that there was sufficient evidence presented to sustain defendant's conviction of RCSP, we reverse defendant's convictions and remand for a new trial based on the evidentiary issues presented.

The incident occurred on March 9, 1998, during the night, when a neighbor, Terry Feick, saw two men apparently attempting to break into an unoccupied house across the street. The house was owned by Mary Kimball, who was staying with family members because her husband had died the previous month. Apparently, there had been previous break-ins of this house in the preceding two or three weeks. Robert Jones was the man with defendant during the break-in, and Jones testified for the prosecution. Jones stated that defendant was living with him and his girlfriend at the time. Jones admitted at trial that he and defendant tried to get into the garage, but were unable to do so. Jones further testified that defendant told him that he (defendant) had been in the house before and had taken some dolls and that there was "cool stuff" in the garage. Jones denied that they went into the house the night of March 9, 1998, and stated that he and defendant were arrested as they were returning to their

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

car. Police officers who searched the house, however, found wet footprints inside the door. Upon searching Jones' house, the police seized several items that were identified as belonging to defendant; some of these items were later identified by Mary Kimball as belonging to her.

On appeal, defendant raises three issues. He first argues that there was insufficient evidence presented to sustain his conviction of RCSP because there was insufficient evidence regarding the value of the stolen items. He also argues that the trial court abused its discretion in allowing him to be impeached with a prior conviction of breaking and entering and two prior convictions of RCSP. Lastly, he argues that the prosecutor committed misconduct by repeatedly injecting evidence of defendant's assertion of his right to remain silent during a postarrest, post-*Miranda*¹ interrogation. Although we find that sufficient evidence was presented to sustain defendant's conviction of RCSP, we agree with defendant regarding the other two issues and remand for a new trial.

Defendant first argues that the trial court erred in denying his motion for directed verdict on the charge of RCSP because the value of the goods was not sufficiently shown to be in excess of \$100. A court assesses the merits of a motion for a directed verdict through consideration of the evidence presented by the prosecution in a light most favorable to the prosecution to determine whether a rational trier of fact could find that the elements of the crime were proven beyond a reasonable doubt. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993). Circumstantial evidence and reasonable inferences drawn from the evidence may be sufficient to prove the elements of a crime. *Id.*

The elements of RCSP in excess of \$100 are: (1) the property was stolen, (2) the property has a fair market value of over \$100, (3) the defendant bought, received, possessed, or concealed the property with knowledge that the property was stolen, and (4) the property was identified as being previously stolen. *People v Gow*, 203 Mich App 94, 96; 512 NW2d 34 (1993). Here, defendant attacks the second element of the crime, contending that there was insufficient evidence that the value of the property was in excess of \$100. It is well established that the value of stolen goods is their market value at the time of the receiving or possession by defendant. *People v Toodle*, 155 Mich App 539, 553; 400 NW2d 670 (1986). "This value is to be determined by the jury by consideration of all the testimony that has been presented in the case, and applying its judgment to that testimony to determine the value." *Id.* However, it is also generally true that the owner of personal property is qualified to testify regarding the value of the property where the testimony does not relate to the sentimental, personal, or subjective value to the owner. *People v Brown*, 179 Mich App 131, 133-134; 445 NW2d 801 (1989); *People v Dyer*, 157 Mich App 606, 611; 403 NW2d 84 (1986).

In this case, the stolen items included two handmade mechanical dolls made by Mr. Kimball, battery chargers, grinders, a reel-to-reel tape player, an eight-millimeter projector, a car jack, a car alarm system, adult movie videos, a telephone, power tools, and a pipe clamp.² Mary Kimball provided the only testimony regarding the value of the items. Her testimony was that the car jack,

¹ *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

² We note that color photographs of the stolen goods were admitted as trial exhibits and have been included with the lower court record for our review.

battery chargers, grinders, “and the other items,” including two handmade dolls, had a value in excess of \$100. Here, Kimball’s conclusion that the value of the stolen items was in excess of \$100 in conjunction with the amount of items that were stolen is sufficient for the jury to reasonably infer from all the evidence, based on its judgment, that the value of the stolen items was in excess of \$100.

Accordingly, the trial court did not err in denying defendant’s motion for a directed verdict on the charge of receiving and concealing stolen property in excess of \$100.

Defendant next argues that the trial court committed error requiring reversal when it allowed the prosecutor to impeach him with a prior breaking and entering conviction and two prior RCSP convictions. Before trial, defendant moved in limine to suppress evidence of his prior convictions, arguing that they were theft offenses and too similar to be properly admitted. The prosecutor argued that the two prior RCSP convictions were “per se” admissible under MRE 609 and that the three prior breaking and entering convictions were more probative than prejudicial. The trial court denied defendant’s motion without giving any reasons on the record, thus, we can only assume that it accepted the prosecutor’s argument. Generally, the decision whether to admit evidence is within the trial court’s discretion and is reviewed for an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). However, decisions involving the admission of evidence frequently involve preliminary questions of law, such as whether a rule of evidence or statute preclude the admissibility of the evidence, and such a decision is a question of law that is reviewed de novo. *Id.*

A witness’ credibility may be impeached with prior convictions, MCL 600.2159; MSA 27A.2159, but only if the convictions satisfy the criteria set forth in MRE 609. *People v Nelson*, 234 Mich App 454, 460; 594 NW2d 114 (1999). MRE 609 provides in pertinent 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.

Both breaking and entering and RCSP are offenses involving an element of theft and can be minimally probative. *People v Bartlett*, 197 Mich App 15, 19; 494 NW2d 776 (1992); *People v Dinsmore (On Remand)*, 172 Mich App 561, 562; 432 NW2d 324 (1988); *People v Clark*, 172

Mich App 407, 419-420; 432 NW2d 726 (1988). Therefore, both breaking and entering³ and RCSP are admissible under MRE 609 if they satisfy the balancing test set forth in MRE 609(a)(2)(B). Thus, to the extent that the prosecutor argued, and the trial court agreed, that RCSP is a crime of dishonesty or false statement and is admissible under MRE 609(a)(1) without regard to the balancing test, that is error.

Moreover, the trial court erred in failing to apply the balancing test. MRE 609(a)(2)(B) requires the trial court to determine that the evidence of defendant's prior convictions had significant probative value regarding the issue of credibility and that the probative value of the evidence outweighed its prejudicial effect. As theft offenses, breaking and entering and receiving and concealing both bear only moderately on the issue of veracity. *People v Allen*, 429 Mich 558, 595; 420 NW2d 499 (1988). Although defendant's prior convictions were recent, and thus somewhat probative of his veracity, the danger of unfair prejudice outweighed the probative value of the convictions. Here, the prejudicial impact was great because three of defendant's prior convictions were identical to two of the offenses for which defendant was on trial. Further, defendant's decision to testify was critical to his defense because his testimony was pitted against that of Robert Jones, an alleged accomplice. *People v Johnson*, 170 Mich App 808, 810-811; 429 NW2d 237 (1988); *People v Minor*, 170 Mich App 731, 736-737; 429 NW2d 229 (1988).

The trial court abused its discretion in allowing the prosecutor to admit evidence of defendant's prior convictions on cross-examination and the error is not harmless because its admission resulted in a miscarriage of justice. *Lukity, supra*, p 495. As we have already noted, the evidence was highly prejudicial and had only slight probative value regarding defendant's veracity. The prior convictions were identical to the breaking and entering and RCSP offenses in this case, and defendant's testimony was critical to presenting his defense. Further, this case depended on whether the jury believed defendant or Jones, especially where Jones portrayed himself as not wanting to break into the house and that defendant was solely responsible to the crimes. Consequently, the error was prejudicial and we conclude that it is more probable than not that the error was outcome determinative. *Id.*, pp 495-496.

Defendant also argues that the prosecutor improperly injected evidence that defendant asserted his right to remain silent during his postarrest, post-*Miranda* interrogation.

At trial, the prosecutor first asked Deputy Sheriff Thomas Buckley, one of the arresting officers, about defendant's interrogation at the jail following his arrest. Buckley testified that both he and his partner, Deputy Sheriff Gilbert Sanchez, interviewed defendant at the jail. Buckley stated that Deputy Sanchez gave defendant his *Miranda* warnings, and that defendant gave a statement consistent with the explanation given when the police officers first arrived at the scene. The following then occurred:

³ We note that the prosecutor concedes on appeal that it was error to admit the prior breaking and entering conviction, but contends that the error was harmless.

Q. [By the prosecutor] And what, if anything, else did [defendant] say about his being in the area of Pine Street?

A. [By Deputy Buckley] Um, that's the only reason he would give us for being in that area. We continued to ask him questions. We told him we didn't believe him, the story he was giving us, and he became somewhat irate and accused us of trying to confuse him or trick him into saying something. He told us that he had been in situations before where he had said too much and he didn't want to talk to us anymore.

Similarly, at trial, Deputy Sheriff Sanchez testified that he and his partner took defendant to the sheriff's station and questioned him after reading his *Miranda* rights. Defendant initially gave a statement, and Deputy Sanchez then testified in the following manner:

Q. [By the prosecutor] And what, if anything else did [defendant] have to say?

A. [By Deputy Sanchez] After questioning him for numerous minutes, again inquiring what they were doing there, and told him that we were suspicious of the fact that he was carrying around a screwdriver and flashlights, these looking like burglar tools to us, he became quite irate with us and –

Q. So at that time –

A. – he refused to answer any further questions.

Q. Okay. So you terminated talking to him?

A. That's correct.

Then, during her cross-examination of defendant, the prosecutor and defendant engaged in the following colloquy:

Q. And isn't it true at the time that you were talking about the screwdriver with the police officers, you became very irate with them and accused them of trying to confuse you?

A. No, ma'am. I just said that they were trying to twist words and put words in my mouth, and I wasn't going to speak to them no farther until I get my attorney. And I did further mention to Officer Buckley that I understand that he's just doing his job, but I cannot jeopardize this and I need my attorney present.

At no time did defense counsel object to any of these questions or answers. With regard to forfeited, constitutional error, the standard of review is that the defendant must show a plain error that affected substantial rights. *People v Carines*, 460 Mich 750, 764-765; 597 NW2d 130 (1999). This case clearly implicates defendant's postarrest, post-*Miranda* silence because defendant had been arrested, taken to the sheriff's station, given his *Miranda* warnings, and essentially gave the same

exculpatory version that he gave to the officers at the scene. Defendant then ended the interview and requested counsel. It is the admission of this evidence of defendant ending the interview and requesting counsel that defendant attacks on appeal.

“Generally, the Due Process Clause of the Fourteenth Amendment prohibits the use of postarrest, post-*Miranda* warnings silence to be used against a defendant.” *People v Crump*, 216 Mich App 210, 214; 549 NW2d 36 (1996). In *People v Sholl*, 453 Mich 730, 737; 556 NW2d 851 (1996), our Supreme Court, citing *Doyle v Ohio*, 426 US 610; 96 S Ct 2240; 49 L Ed 2d 91 (1976), further stated that *Doyle* precludes the use of a defendant’s post-*Miranda* silence because it would violate the right to due process to impeach a defendant who may have been relying on police assurance that his silence would not be used against him. Additionally, in *People v Sutton (After Remand)*, 436 Mich 575, 592; 464 NW2d 276 (1990), the Court, also relying on *Doyle*, stated that the Due Process Clause of the Fourteenth Amendment bars the use of post-*Miranda* silence to impeach a defendant’s exculpatory explanation at trial provided that the defendant does not claim to have told the police the same version upon arrest, meaning that the state cannot impeach the credibility of the defendant’s exculpatory testimony at trial with his postarrest, post-*Miranda* silence.

On appeal, the prosecutor contends that there is no error because both deputy sheriffs mentioned defendant’s eventual assertion of his privilege to remain silent and have counsel present in a nonresponsive manner to the prosecutor’s questions at trial. We cannot agree with the prosecutor’s contention in this regard. Even if Buckley’s response may be properly characterized as nonresponsive to the prosecutor’s rather open-ended question, the prosecutor clearly seemed to draw the response from Sanchez, the second officer to testify. Then, the prosecutor continued on this same line during her cross-examination of defendant. This is not a situation where defendant changed his story or attempted to give a false impression (that he cooperated with the police when, in fact, he did not). See, e.g., *People v Allen*, 201 Mich App 98, 102-103; 505 NW2d 869 (1993). Rather, defendant’s version was consistent all along; he gave the police the same version during his pre-*Miranda* and post-*Miranda* statements and at trial.

Consequently, we find that there was plain error; the prosecutor improperly brought out evidence on direct examination of the interviewing officers and on cross-examination of defendant that defendant asserted his right to silence and right to counsel following *Miranda* warnings. We also find that the plain error affected defendant’s substantial rights. The effect of this evidence unfairly tarnished defendant’s veracity in a case that amounted to a credibility contest, especially in conjunction with the erroneous admission of defendant’s prior convictions. *People v Westbrook*, 175 Mich App 435, 440-441; 438 NW2d 300 (1989).

Reversed and remanded for a new trial.

/s/ Donald S. Owens
/s/ Kathleen Jansen
/s/ Robert B. Burns