

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

ALEVANDRO LAVATATE WILLIAMS,

Defendant-Appellant.

UNPUBLISHED

September 28, 2001

No. 225870

Kent Circuit Court

LC No. 98-012223-FH

Before: Griffin, P.J., and Gage and Meter.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction for breaking and entering a building, MCL 750.110. We affirm.

Defendant was discovered by Grand Rapids Police officers inside Kleiman's, a men's clothing store, in the early morning hours of November 16, 1998. How defendant came to be inside the store forms the crux of this case. Defendant asserted at trial that he was homeless and on the night in question he was looking for a place to sleep. He claimed he had heard that there was an unlocked entrance to the attic above Kleiman's and that it was a good place to sleep. According to defendant, as he climbed into the attic that night for that purpose, he fell through the attic floor and into the retail space at Kleiman's. The drop from the attic was more than twenty feet, and he had no means of escape once he fell. He claimed that he had no intent to steal, although he admitted that he had filled two bags with clothing from the store.

Defendant asserts that the trial court erred when it allowed Michael Krywanski, the supervisor of defendant's parole officer, to testify at trial. Defendant's first argument regarding Krywanski is that his testimony was not relevant pursuant to MRE 401 and 402. Defendant objected at trial on the ground of hearsay but did not object on the ground of relevance and so this issue is unpreserved. *People v Furman*, 158 Mich App 302, 329-330; 404 NW2d 246 (1987). For unpreserved nonconstitutional error, a defendant must show a plain error affecting substantial rights. *People v Grant*, 445 Mich 535; 520 NW2d 123 (1994). Defendant testified that he had no place to sleep on the night in question because he had missed curfew at the Salvation Army shelter where he was required to remain as a condition of his parole. Krywanski was called as a rebuttal witness to testify that although defendant had absconded from his parole by missing curfew, contrary to defendant's testimony it was not the shelter's policy to turn away

individuals seeking shelter and thus defendant could have stayed at the shelter that evening. Thus, his testimony made defendant's testimony less probable and it was therefore relevant.

Defendant also asserts that the probative value of this evidence was outweighed by the prejudicial effect of having Krywanski testify that defendant had absconded from his parole. We again disagree. Pursuant to MRE 403, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." However, defendant admitted during his direct examination that he was on parole at the time the offense occurred, that a condition of his parole required him to remain at the Salvation Army shelter for rehabilitation, and that he left the program and missed the curfew: all facts which he now claims caused him prejudice. Because these facts were brought forth during the direct examination, any prejudicial effect by Krywanski repeating these facts was minimal. Thus, we cannot say that any prejudicial effect substantially outweighed the probative value of the testimony. Therefore, the trial court did not err when it allowed Krywanski to testify.

Defendant also asserts that Krywanski's testimony was hearsay and should not have been admitted on that basis. Even assuming that the testimony was hearsay, we believe any error that may have occurred was harmless. Evidentiary rulings are subject to a harmless error analysis. *People v Price*, 214 Mich App 538, 546; 543 NW2d 49 (1995). Preserved, nonconstitutional errors require reversal only if "after an examination of the entire cause, it shall affirmatively appear that it is more probable than not that the error was outcome determinative." *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999). As noted above, defendant testified during his direct examination that he had left the Salvation Army rehabilitation program. Indeed, defendant admitted that he was released from prison where he had been serving time for possession of cocaine, that he was required to remain in the rehabilitation program at the shelter, that he left the program without permission and that his leaving constituted a violation of his parole terms. Thus, Krywanski's testimony, which merely repeated the fact that defendant had absconded from his parole, was not outcome determinative. Defendant is not entitled to relief on this basis.

Defendant's next argument is that the trial court failed to adequately instruct the jury after the prosecutor, during his opening statement, referred to defendant as a "dumb criminal." We find no error on the part of the trial court. Because defendant did not object to the instruction or ask for a supplemental instruction, this issue is unpreserved for appeal. *People v Fowlkes*, 130 Mich App 828, 835; 345 NW2d 629 (1983). Therefore, reversal of defendant's conviction can only be warranted if this Court finds that plain error occurred. *Grant, supra*. In this case, defendant has failed to establish plain error, and therefore he is not entitled to relief. *Lukity, supra*.

In his appellate brief, defendant merely asserts that the instruction was inadequate, without any supporting authority or explanation of why the instruction failed to cure any prejudice flowing from the prosecutor's remarks. On the contrary, the instruction was adequate. The trial court instructed the jury that defendant was presumed innocent during the trial and it should disregard the prosecutor's comment. Juries are presumed to follow the instructions given

to them. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Defendant's contention in this case presumes the opposite, that the jury did not follow its instruction from the court to disregard the prosecutor's comments. Defendant also fails to offer support for the conclusion that the instruction failed to cure any prejudice. Thus, no error occurred, and therefore defendant is not entitled to relief on this basis.

Finally, defendant asserts that he was denied a fair trial because the trial court ruled on the admissibility of his prior convictions for impeachment purposes after he had given direct testimony and was in the midst of his cross-examination. We again disagree with defendant's argument.

Similar arguments have been rejected by previous decisions of this Court. See *People v Hubbard*, 159 Mich App 321, 323; 406 NW2d 287 (1987). In *Hubbard*, the defendant sought a new trial based on an argument that he was denied a fair trial because the trial court ruled on the admissibility of his prior convictions after defendant had testified on direct examination. *Id.* Rejecting this argument, this Court reasoned that the defendant's argument, which relied on the proposition that a defendant is entitled to know before he takes the stand if his prior convictions will be used to impeach him, added a procedural requirement to MRE 609 that is not present in its language. *Id.* at 325. This Court further rejected the reasoning of previous decisions in line with the defendant's argument, finding them unsupported by case law. *Id.* at 325-326. This Court stated that

[w]e disagree with the blanket holding in [*People v*] *Ash* [128 Mich App 265; 340 NW2d 646 (1983)], *supra*, pp 268-269, that a defendant is entitled to know before taking the stand whether evidence of a prior conviction will be used for impeachment. Such a holding would add a procedural requirement not contained in MRE 609 itself. The authority cited by the *Ash* Court in support of this holding is *People v Lytal*, 415 Mich 603, 609-610; 329 NW2d 738 (1982). However, we conclude that the *Ash* Court's reliance on *Lytal* is misplaced. [*Id.* at 324-325.]

Similarly, defendant in the instant case relies on *People v Lytal*, 415 Mich 603; 329 NW2d 738 (1982), and its progeny to argue that he was entitled to know whether his prior convictions would be used against him. The *Hubbard* Court ultimately opined that *Lytal* stood only for the proposition that a trial court could not condition admissibility of prior convictions on a defendant's testimony. *Hubbard, supra* at 326. The trial court in this case did not condition admissibility on defendant's testimony; instead, the trial court informed defendant that it was possible that his convictions would be admitted. Thus, *Lytal, supra*, is not applicable to this case. Further, because accepting defendant's argument would add a requirement not included in the language of MRE 609, the trial court did not err when it ruled on the admissibility of defendant's convictions after he had given his direct testimony and was subject to cross examination. See *Hubbard, supra* at 324-325. Defendant is therefore not entitled to relief on this basis.

Affirmed.

/s/ Richard Allen Griffin

/s/ Hilda R. Gage

/s/ Patrick M. Meter