

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
April 26, 2011

v

MICHAEL DE'ANDRE RANSOM,

Defendant-Appellant.

No. 295357
Oakland Circuit Court
LC No. 2009-224634-FC

Before: CAVANAGH, P.J., and JANSEN and SERVITTO, JJ.

JANSEN, J. (*concurring in part and dissenting in part*).

I fully concur with the majority's determination that the offense of unlawfully driving away an automobile (UDAA), MCL 750.413, does not involve "an element of dishonesty or false statement" within the meaning of MRE 609(a)(1). See *People v Hendricks*, 200 Mich App 68, 71; 503 NW2d 689 (1993), aff'd 446 Mich 435 (1994); see also *Landon v Titan Ins Co*, 251 Mich App 633, 639; 651 NW2d 93 (2002). Because UDAA does not contain "an element of dishonesty or false statement," evidence of a witness's prior UDAA conviction may not be used to impeach his or her credibility under MRE 609(a)(1). I also concur with the majority's determination that the offense of UDAA does not contain "an element of theft" within the meaning of MRE 609(a)(2). Our Supreme Court has made clear that UDAA is *not* a theft offense. *People v Hendricks*, 446 Mich 435, 448-449; 521 NW2d 546 (1994). The trial court therefore abused its discretion by permitting the prosecution to impeach defendant's credibility with evidence of one of his prior UDAA convictions.

Unlike the majority, however, I cannot conclude that this error was harmless under the test of MCL 769.26 and *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999). Trial in this case was essentially a credibility contest between defendant and Wimbs. It is absolutely true that defendant admitted to shooting the gun and firing the shots that struck Wimbs. However, the identity of the shooter was never even in dispute. The real issue in this case was whether defendant reasonably acted in self defense. There were no eyewitnesses to the assault other than Wimbs and defendant, and there was significantly conflicting testimony concerning whether defendant or Wimbs was the initial aggressor and whether Wimbs was reaching for a weapon at the time he approached defendant. It is undisputed that the police found a machete inside Wimbs's pants immediately after the shooting.

The trial court specifically instructed the jury that it was entitled to consider defendant's prior UDAA conviction "in deciding whether you believe . . . the defendant is a truthful witness." I acknowledge that Wimbs was similarly impeached with evidence of a prior UDAA conviction of his own, and that the trial court instructed the jury that it could consider Wimbs's UDAA conviction "when you decide whether you believe [Wimbs's] testimony and how important you think it is." But I perceive no credible reason to conclude that if the jury disbelieved defendant, it must have disbelieved the complaining witness to the same extent, and that this necessarily must have alleviated any potential prejudice. On the contrary, the fact that Wimbs was improperly impeached with evidence of a prior UDAA conviction did not cure the error resulting from the improper impeachment of defendant. It is fundamental that a jury is free to believe one witness but to disbelieve another witness, even if both witnesses have been impeached to the same extent. See *People v Perry*, 460 Mich 55, 63; 594 NW2d 477 (1999) (observing that "a jury is free to believe or disbelieve, in whole or in part, any of the evidence presented"). Moreover, "[t]wo wrongs can never make a right." *Morrison v Skeels*, 16 Mich App 727, 735; 168 NW2d 644 (1969). Again, the only real issue at trial was whether the jury found defendant or Wimbs to be more believable with regard to the timing and circumstances of the assault. I cannot conclude that the erroneous impeachment of defendant's credibility with evidence of his prior UDAA conviction was harmless on the facts of this case. I believe that the error more probably than not affected the outcome of defendant's trial.

/s/ Kathleen Jansen