

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
October 16, 2012

v

WILLIAM COLIN BAGGALLAY, JR.,
Defendant-Appellant.

No. 306243
Huron Circuit Court
LC No. 10-004878-FH

Before: JANSEN, P.J., and FORT HOOD and SHAPIRO, JJ.

PER CURIAM.

Defendant was convicted following a jury trial of aggravated indecent exposure.¹ He subsequently pleaded nolo contendere to being a sexually delinquent person.² Defendant was sentenced to 12 months in the Huron County Jail. He now appeals by right, claiming the lower court denied him the right to testify at trial. We affirm.

I. BASIC FACTS

The evidence adduced below established that defendant pulled his truck into the parking lot of a local grocery store and parked alongside a minivan occupied by a twenty-seven-year-old woman and her two-year-old niece. Defendant made eye contact with the woman and began fondling himself. The woman ran from her vehicle, recorded defendant's license plate number, and called the police. Defendant later admitted to being in the parking lot at the time of the incident, but claimed he was checking gas prices.

Prior to trial, the prosecution moved to introduce defendant's previous conviction for indecent exposure under MRE 404(b). The circumstances of defendant's previous conviction were substantially similar to those involved in this case. Defendant objected, arguing that it was inadmissible propensity evidence, and that it was substantially more prejudicial than probative. Initially, the lower court ruled that the previous conviction was admissible under MRE 404(b) to prove defendant's intent. However, ultimately, the lower court stated that it preferred to "find

¹ MCL 750.335a(2)(b).

² MCL 750.335a(2)(c).

out what the defense is first,” and indicated the right to present the evidence would be reserved for rebuttal. After the prosecution’s case-in-chief, defendant affirmatively waived his right to testify without explanation. The prosecution never introduced defendant’s previous conviction.

II. ANALYSIS

Defendant now claims that he was forced to surrender his right to testify³ by the lower court’s in limine decision to admit his previous conviction on rebuttal. He asserts that he would have testified but for the court’s ruling. We disagree.

Defendant did not raise this issue at trial. Adopting the rule laid down in *Luce v United States*,⁴ the Michigan Supreme Court held in *People v Finley*⁵, that “a defendant must testify in order to preserve for review the issue of improper impeachment by prior convictions.” In *Finley*, the defendant chose not to testify at trial in order to prevent the prosecution from impeaching him with a previous conviction.⁶ In finding defendant’s claim unpreserved, the Court reasoned that evidentiary error does not occur until it occurs.⁷ “That is, until the evidence is admitted.”⁸ “Any prejudice to the defendant arising out of an improper evidentiary ruling is purely speculative in the absence of his testimony.”⁹ Moreover, the lower court can change its in limine ruling when the case unfolds, or the prosecution can decide not to introduce the evidence as a matter of trial strategy.¹⁰

The Court also noted that a defendant bases his decision not to testify on a number of factors.¹¹ If an appellate court assumed that a defendant chose not to testify because of a pretrial error, it could never consider that error harmless.¹² Requiring a defendant to testify thus enables

³ The United States Supreme Court held in *Rock v Arkansas* that “a defendant in a criminal case has the right to take the witness stand and to testify in his or her own defense.” 483 US 44, 49; 107 S Ct 2704, 2708; 97 L Ed 2d 37 (1987). This right is grounded in several provisions of the US Constitution, including the Due Process Clause of the Fifth and Fourteenth Amendments, and the Compulsory Process Clause of the Sixth Amendment. *Id.* at 52.

⁴ 469 US 38; 105 S Ct 460; 83 L Ed 2d 443 (1984).

⁵ *People v Finley*, 431 Mich 506, 521; 431 NW2d 19 (1988).

⁶ *Id.* at 511.

⁷ *Id.* at 512.

⁸ *Id.*

⁹ *Id.* at 519.

¹⁰ *Id.* at 512-513.

¹¹ *Id.* at 513.

¹² *Id.*

the reviewing court to determine the impact of a pretrial error in light of the record as a whole.¹³ It also discourages a defendant from making motions in limine solely to “plant reversible error in the event of conviction.”¹⁴

Here, defendant waived his claim of error by unequivocally waiving his right to testify at trial. As in *Finley*, defendant’s lack of testimony prevents this Court from conducting meaningful appellate review. Without defendant’s testimony, any prejudice that could have resulted from the trial court’s ruling is speculative.

Defendant argues that when the court ruled that his prior conviction was admissible, he was in essence denied of his right to testify. The facts reflect, however, that the court never made a ruling to admit defendant’s previous conviction. As previously explained, the lower court expressly reserved its ruling on the issue.¹⁵ Defendant’s further argument that the mere possibility that the trial court would admit the evidence was sufficient to serve as a denial of his right to testify is unpersuasive.

Affirmed.

/s/ Kathleen Jansen
/s/ Karen M. Fort Hood
/s/ Douglas B. Shapiro

¹³ *Id.*

¹⁴ *Id.* (quotations omitted).

¹⁵ It is within the discretion of the court to reserve its ruling on evidence. The Michigan Supreme Court held in *People v. Taylor*, 422 Mich 407, 410, 373 N W 2d 579 (1985), that it is not an abuse of discretion by the trial court to reserve its ruling on admission of evidence. In the instant case, the same rule applies. See *id.* at 411.