

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DOMINIQUE CARY,

Defendant-Appellant.

UNPUBLISHED

January 24, 2003

No. 231518

Oakland Circuit Court

LC No. 00-172446-FH

Before: Meter, P.J., and Saad and R.B. Burns *, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions by a jury of conspiracy to commit false pretenses over \$20,000, MCL 750.157a, and false pretenses with intent to defraud of \$20,000 or more, MCL 750.218(5)(a). The trial court, applying a fourth-offense habitual offender enhancement under MCL 769.12, sentenced him to two concurrent terms of five to twenty years' imprisonment. We affirm.

Defendant first argues that the prosecutor and the trial court erroneously allowed into evidence the fact of defendant's prior conviction for retail fraud absent an application of the balancing test required under MRE 609(a)(2)(B). However, defendant did not object to the admission of this evidence below. Accordingly, relief is warranted only if a plain, i.e., a clear or obvious, error occurred that affected defendant's substantial rights, i.e., that affected the outcome of the case. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). We discern no outcome-determinative error.

Evidence of a prior conviction may be admissible for impeachment purposes either automatically, in the case of an offense involving dishonesty or a false statement, or after a balancing test, in the case of an offense involving theft. MRE 609; *People v Parcha*, 227 Mich App 236, 243; 575 NW2d 316 (1997). MRE 609 states, in 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

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

- (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.

The retail fraud offense at issue here involved theft rather than dishonesty. Therefore, according to the statute, evidence of this crime should not have been admitted unless the trial court employed the balancing test under MRE 609(a)(2)(B). The court, however, did not do so.

This omission, however, did not affect defendant's substantial rights. *Carines, supra* at 763. Indeed, had the trial court applied the balancing test, the evidence would have been admissible. Crimes of intent to commit theft, such as going into a store and stealing an item, are "moderately probative of veracity." *People v Allen*, 429 Mich 558, 610-611; 420 NW2d 499 (1988). Moreover, defendant's prior conviction was only four or five years old at the time of trial, and the "recentness of the crime accents [the] probative value." *Id.* at 611. Additionally, defendant testified to his own version of events at issue at trial and was not dissuaded by the introduction of the evidence. Finally, the former conviction of retail fraud, involving the stealing of an item from a store, is not similar to the instant offense of using false identification to sign documents to obtain a vehicle. See, generally, *id.* (similarity of prior conviction to crime charged weighs against admission of evidence of prior conviction). Therefore, using the retail fraud conviction to impeach defendant, when properly balanced for probative value versus prejudicial effect, was proper. Defendant has not met his burden for relief under *Carines, supra* at 763.

Next, defendant argues that the prosecutor and the trial court erroneously allowed into evidence the underlying facts of his prior conviction for attempted false pretenses.¹ Defendant failed to object to the evidence, however, so we once again review this issue for a clear or obvious error that affected the outcome of the case. *Id.*

By eliciting the details of defendant's prior conviction, the prosecutor was merely rebutting defendant's assertion that he believed he did nothing wrong with regard to the instant offenses. The prosecutor attempted to impeach defendant by showing that he knew he was acting wrongly because he had been convicted previously under circumstances similar to those in the instant case. Accordingly, we discern no clear or obvious error with regard to this issue. Moreover, given the substantial evidence supporting defendant's conviction, we conclude that

¹ Defendant acknowledges that evidence of the conviction itself was admissible for impeachment under MRE 609(a)(1).

even if an error *did* occur, it did not affect the outcome of the case. Reversal is therefore unwarranted. *Id.*²

Defendant additionally contends that his trial attorney's failure to object to the evidence discussed above amounted to ineffective assistance of counsel. We disagree. "To establish a claim of ineffective assistance of counsel, the defendant must show that counsel's performance was deficient and that there is a reasonable probability that, but for the deficiency, the fact finder would not have convicted the defendant." *People v Snider*, 239 Mich App 393, 423-424; 608 NW2d 502 (2000). "Furthermore, the defendant must overcome the presumption that the challenged action [was] sound trial strategy." *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). Given the above analysis, defendant has not met his burden for relief under *Snider*, *supra* at 423-424. Indeed, any deficiency on the part of defense counsel did not affect the outcome of the case.

Next, defendant argues that the prosecutor and the trial court erroneously allowed into evidence the fact that defendant's accomplice, Troy Fenderson, had previously been convicted for the current offense under the terms of a plea agreement. Because defendant did not object to the evidence below, we once again review this issue under the plain error rule from *Carines*, *supra* at 763.

In certain cases, the admission into evidence of an accomplice's conviction at a separate trial is erroneous because a jury might impute an accomplice's conviction to a defendant. *People v Dowdy*, 211 Mich App 562, 571; 536 NW2d 794 (1995). However, if evidence of an accomplice's conviction by plea is admitted, a new trial should not be granted if defense counsel used information of the accomplice's conviction to support defendant's theory of the case. *Id.* at 571-572.

Here, defense counsel did not object to the evidence at issue, and he subsequently used the evidence to cross-examine Fenderson at length and to impeach his credibility. Under these circumstances, no error requiring reversal occurred. *Id.* at 572 ("[w]e will not allow a defendant to use the plea information to undermine the accomplice's credibility at trial, and then allow him to argue on appeal that introduction of the evidence of the plea was prejudicial"). Moreover, given the substantial evidence supporting defendant's conviction, we cannot conclude that the evidence of Fenderson's conviction affected the outcome of the case. *Carines*, *supra* at 763.

Next, defendant argues that the trial court should have sua sponte instructed the jury with regard to the special nature accomplice testimony. However, defense counsel expressed affirmative satisfaction with the jury instructions. This approval extinguished any error with regard to the instructions and precludes appellate review. *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000). In any event, a trial court's failure to give sua sponte an instruction on accomplice testimony can potentially warrant reversal only if the case is "closely drawn."

² Defendant also suggests on appeal that the trial court erred in failing to give a cautionary instruction to the jury. However, this issue has been waived. Waiver is the intentional relinquishment of a known right. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000). Defense counsel expressed affirmative satisfaction with the jury instructions. This approval extinguished any error and precludes appellate review of this issue. *Id.* at 215-216.

People v Reed, 453 Mich 685, 691; 556 NW2d 858 (1996). This case was not closely drawn, given the substantial evidence, aside from Fenderson’s testimony, that supported defendant’s convictions. Reversal is unwarranted.

Next, defendant argues that the prosecutor presented insufficient evidence of false pretenses with intent to defraud because defendant merely obtained a *lease* to the vehicle in question, without the dealership passing title to him. Defendant contends that he instead should have been charged with larceny by conversion,³ because the dealership voluntarily gave him possession of the vehicle without transferring or intending to transfer title. This issue involves a question of law, and we review questions of law de novo. See *People v Mass*, 464 Mich 615, 622; 628 NW2d 540 (2001).

MCL 750.218, states, in pertinent part:

(1) A person who, with intent to defraud or cheat and by color of a false token or writing, by a false or bogus check or other written, printed, or engraved instrument, by counterfeit coin or metal that is intended to simulate a coin, or by any other false pretense does 1 or more of the following is guilty of a crime punishable as provided in this section:

(c) Obtains from a person any money or personal property or the use^[4] of any instrument, facility, article, or other valuable things or service.

In the present case, defendant used fake identification to obtain an automobile from a dealership, and thus his conduct clearly fell within the parameters of MCL 750.218. Defendant contends, however, that because “title was never conveyed, . . . the essential element of the

³ The larceny by conversion statute, MCL 750.362, states:

Any person to whom any money, goods or other property, which may be the subject of larceny, shall have been delivered, who shall embezzle or fraudulently convert to his own use, or shall secrete with the intent to embezzle, or fraudulently use such goods, money or other property, or any part thereof, shall be deemed by so doing to have committed the crime of larceny. . . .

⁴ The prosecutor contends that the issue of title is irrelevant because defendant violated MCL 750.218 by his *use* of the vehicle in question. While we agree that “use” of a vehicle falls within the parameters of the statute, we disagree that “use” formed the basis of the instant conviction. Indeed, defendant was convicted and sentenced under MCL 750.218(5)(a), which deals with a situation in which “[t]he land, interest in land, money, personal property, use of the instrument, facility, article, or valuable thing, service, larger amount obtained, or smaller amount sold or disposed of has a value of \$20,000.00 or more.” The prosecutor did not establish that defendant’s “use” of the vehicle under a three-year lease would be worth \$20,000. Instead, the prosecutor focused on the purchase price of the vehicle, which was over \$20,000. Accordingly, the pertinent question is whether the prosecutor established that defendant violated MCL 750.218 by obtaining the vehicle itself (and not just the *lease* of the vehicle).

charge was missing.” However, as noted in *People v Cage*, 90 Mich App 497, 498; 282 NW2d 368 (1979), rev’d on other grounds 410 Mich 401 (1981),⁵ “Intent to pass title is no longer required under the statute.” See also *People v Sharpe*, 22 Mich App 454, 458; 178 NW2d 90 (1970) (on which the *Cage* Court relied). We acknowledge that in *People v Malach*, 202 Mich App 266, 271; 507 NW2d 834 (1993), the Court stated that “if the owner of the goods intends to keep title but part with possession, the crime is larceny; if the owner intends to part with both title and possession, albeit for the wrong reasons, the crime is false pretenses.” However, *Malach* and the cases cited therein did not address a person obtaining a vehicle under false circumstances and then essentially stealing the vehicle – the scenario at issue in *Cage* and in the instant case. We therefore find the reasoning in *Cage* and *Sharpe* to be the more analogous and applicable case here and do not consider *Malach* to be binding authority with respect to the specific facts of the instant case. Moreover, even accepting defendant’s appellate argument at face value, we would nonetheless find no basis for reversal because the prosecutor introduced sufficient evidence, by way of a trial exhibit, that defendant *did* in fact receive title to the vehicle in question.⁶

Defendant lastly contends that his attorney rendered ineffective assistance of counsel by failing to move for a directed verdict of acquittal with regard to the “leased vehicle” argument discussed above. Because the “leased vehicle” argument has no merit and sufficient evidence existed to support defendant’s conviction under MCL 750.218, no ineffective assistance of counsel occurred. See, generally, *Snider*, *supra* at 423-424.

Affirmed.

/s/ Patrick M. Meter
/s/ Henry William Saad
/s/ Robert B. Burns

⁵ We acknowledge that in *Taylor v Kurapati*, 236 Mich App 315, 345-346; 600 NW2d 670 (1999), this Court suggested that a rule of law expressed in an opinion that is subsequently reversed on other grounds is no longer a viable rule of law. However, the *Cage* Court relied on the *Sharpe* opinion for its rationale with regard to the issue in question, and *Sharpe* has not been reversed or modified. Moreover, the *Taylor* Court was specifically interpreting the language of MCR 7.215(H)(1) (now MCR 7.215[I][1]), which applies to opinions issued on or after November 1, 1990.

⁶ A witness testified that the exhibit, a special mailing of certificate of title, was being mailed to the finance company. Albert Niemi, the person whom defendant impersonated to lease the vehicle, testified that he did not affix his purported signature to the document.