

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DERRICK R. SMITH,

Defendant-Appellant.

UNPUBLISHED

July 25, 2006

No. 260160

Wayne Circuit Court

LC No. 2004-001586-FH

Before: Fitzgerald, P.J., and Saad and Cooper, JJ.

COOPER, J. (*concurring in part, dissenting in part*).

Defendant appeals as of right his conviction, following a jury trial, of second-degree murder, MCL 750.317, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. The majority affirms, and I concur in that result, but I write separately because I disagree with the majority's analysis and conclusion on the issue of the admissibility of proposed defense witness Gregory Berry's prior conviction.

MRE 609 governs admissibility of evidence of prior convictions "[f]or the purpose of attacking the credibility of a witness" The trial court ruled the evidence admissible, asserting that MRE 609 was inapplicable because the court was "not admitting this evidence for any purpose that has to do with impeachment, but rather as it goes to a witness's bias or motive for testifying." I find this distinction both illogical and somewhat silly. Allowing evidence that the witness was recently convicted of a crime in order to suggest that the witness is biased against the prosecutor and that bias is the motive for the testimony is most certainly a challenge to the credibility of the witness. Proving bias is impeachment.

The majority correctly notes that "[p]roof of bias is almost always relevant because the jury, as finder of fact and weigher of credibility, has historically been entitled to assess all evidence that might bear on the accuracy and truth of a witness' testimony." *People v Layher*, 464 Mich 756, 763; 631 NW2d 281 (2001). However, relevance is not the only factor to weigh in determining whether evidence is admissible. Where, as here, a rule of evidence (MRE 609) speaks directly to the proposed evidence, I would find that it must be applied rather than disingenuously circumvented; to find otherwise would render MRE 609 nugatory.

Our review of evidentiary rulings is for abuse of discretion. *People v Sabin (After Remand)*, 463 Mich 43, 60; 614 NW2d 888 (2000). Because I can find no plausible reason to

admit the evidence of the prior conviction of the proposed witness other than to impeach his credibility, I would find the trial judge abused his discretion in this matter.

However, I also agree with the majority that because Berry did not testify at trial, we have nothing in the record other than counsel's argument that he failed to testify because of the trial court's ruling. While we can surmise that this reasoning is plausible, reversal is not warranted on that speculative basis.

/s/ Jessica R. Cooper