

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RAYMOND LEONARD GRABIEC,

Defendant-Appellant.

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UNPUBLISHED

October 19, 2006

No. 266512

Ingham County Circuit Court

LC No. 02-000382-FH

Before: Cavanagh, P.J., Bandstra and Owens, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of third-degree criminal sexual conduct, MCL 750.520d(1)(a). Defendant was sentenced as a second habitual offender, MCL 769.10, to 51 months' to 270 months' imprisonment. Defendant appeals as of right and we affirm.

Defendant's sole argument on appeal is that he was denied effective assistance of counsel. Specifically, defendant argues that trial counsel's failure to argue against the admission of defendant's prior conviction for breaking and entering (B&E) of a building for impeachment purposes constituted ineffective assistance of counsel. We disagree. Generally, in order to preserve an effective assistance of counsel challenge, a defendant must move for a new trial or an evidentiary hearing before the trial court. *People v Marji*, 180 Mich App 525, 533; 447 NW2d 835 (1989). Because defendant failed to move for a new trial or evidentiary hearing, our review is limited to mistakes apparent on the record. *Id.*

To prove a claim of ineffective assistance of counsel,

a defendant must prove that his counsel's performance was deficient and that, under an objective standard of reasonableness, defendant was denied his Sixth Amendment right to counsel. The deficiency must be prejudicial to defendant to the extent that, but for counsel's error, the result of the proceedings would have been different. Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. [*People v Mack*, 265 Mich App 122, 129; 695 NW2d 342 (2005).]

Defendant asserts that trial counsel's remark, "I would like to object [to the admission of the prior conviction] . . . but pursuant to the court rule [the prosecutor] . . . can do that,"

evidences both a lack of understanding of the requirements of MRE 609 and the absence of a trial strategy in conceding the admission of the conviction.

MCL 750.110 provides that “[a] person who breaks and enters, with intent to commit a felony or a larceny therein, a . . . building . . . is guilty of a felony.” We have been unable to find anything in the record identifying the intended felony that underlies defendant’s B&E conviction. Because defendant has the burden of overcoming the strong presumption that counsel provided effective assistance, *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995), we proceed—as does defendant’s brief on appeal—on the assumption that the B&E in issue was a theft crime. Thus, the only issue before this Court is whether counsel was ineffective for failing to argue that the probative value of the prior conviction was minimal and outweighed by its prejudicial effect. MRE 609(a)(2)(B).

Pursuant to MCL 600.2159, a witness’s credibility may be impeached with evidence of prior convictions, but only if the convictions satisfy the criteria set forth in MRE 609. *People v Cross*, 202 Mich App 138, 146; 508 NW2d 144 (1993). MRE 609(a) provides as follows:

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

(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.

“Crimes of theft are minimally probative and are therefore admissible only if the probative value outweighs the prejudicial effect as determined under the balancing test of MRE 609(a)(2)(B).” *People v Bartlett*, 197 Mich App 15, 19; 494 NW2d 776 (1992), citing *People v Allen*, 429 Mich 558, 595; 420 NW2d 499 (1988). MRE 609(b) provides in pertinent part as follows:

For purposes of the probative value determination required by subrule (a)(2)(B), the court shall consider only the age of the conviction and the degree to which a conviction of the crime is indicative of veracity. If a determination of prejudicial effect is required, the court shall consider only the conviction’s similarity to the charged offense and the possible effects on the decisional process if admitting the evidence causes the defendant to elect not to testify. . . .

Credibility was an important factor in this case. At the time of his trial on the present charges, defendant's 2000 B&E conviction was only two years old, thereby "adding to its probative value." *Bartlett, supra* at 20. Moreover, because defendant's prior B&E conviction was dissimilar to the present CSC charges, and because defendant chose to testify on his own behalf despite possessing knowledge that the prosecution was going to introduce the conviction as impeachment evidence, the potential for any prejudicial effect was minimal. MRE 609(b). Given this balance, and considering the importance of defendant's credibility in this prosecution, defendant fails to establish that counsel's assistance was objectively unreasonable. Indeed, we conclude that had defendant objected, the trial court would have concluded that defendant's prior B&E conviction could be admitted to be used against him as impeachment evidence.<sup>1</sup>

Further, given the weight of the evidence adduced below, defendant is unable to establish the requisite prejudice.

Affirmed.

/s/ Mark J. Cavanagh  
/s/ Richard A. Bandstra  
/s/ Donald S. Owens

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<sup>1</sup> A trial court is required to articulate its analysis of the probative value versus the prejudicial nature of the evidence on the record. MRE 609(b). In this case, the trial court should not be deemed to have erred because defendant conceded admission of the prior conviction. See *People v Griffin*, 235 Mich App 27, 46; 597 NW2d 176 (1999) (observing that "error requiring reversal cannot be error to which the aggrieved party contributed by plan or negligence"). Moreover, any error in this regard is harmless in light of the other evidence adduced at trial. See *Allen, supra* at 612.