

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2019-KA-01454-COA

**ANTONIO ROSS A/K/A ANTONIO D. ROSS
A/K/A ANTONIO DESHOND ROSS**

APPELLANT

v.

STATE OF MISSISSIPPI

APPELLEE

DATE OF JUDGMENT: 09/05/2019
TRIAL JUDGE: HON. LEE J. HOWARD
COURT FROM WHICH APPEALED: LOWNDES COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT: OFFICE OF STATE PUBLIC DEFENDER
BY: MOLLIE MARIE McMILLIN
ATTORNEY FOR APPELLEE: OFFICE OF THE ATTORNEY GENERAL
BY: ALLISON ELIZABETH HORNE
DISTRICT ATTORNEY: SCOTT WINSTON COLOM
NATURE OF THE CASE: CRIMINAL - FELONY
DISPOSITION: AFFIRMED - 12/08/2020
MOTION FOR REHEARING FILED:
MANDATE ISSUED:

BEFORE BARNES, C.J., McDONALD AND LAWRENCE, JJ.

McDONALD, J., FOR THE COURT:

¶1. A Lowndes County Circuit Court jury convicted Antonio Ross of burglary of a business pursuant to Mississippi Code Annotated section 97-17-33 (Rev. 2014) on September 4, 2019. The circuit court sentenced Ross as a habitual offender to serve the maximum term of seven years of incarceration without eligibility for parole in the custody of the Mississippi Department of Corrections (MDOC). Ross moved for judgment notwithstanding the verdict (JNOV) or, in the alternative, a new trial, arguing that the circuit court erred in ruling that evidence of Ross's prior felony was admissible. After the circuit court denied the motion,

Ross appealed, raising the sole issue of whether the circuit court erred in ruling that evidence of his prior felony conviction was admissible for purposes of impeachment pursuant to Rule 609 of the Mississippi Rules of Evidence. We find that the circuit court did not abuse its discretion and affirm.

Statement of the Facts and Procedural History

¶2. Around 2:23 a.m. on October 3, 2018, two men broke into the OK Food Store in Columbus, Mississippi. The burglary triggered the alarm system. When the police officers arrived at the store, they found a trail of packs of cigarettes and a cash-register tape, which led them to the Greenville Columbus railyard. At the railyard, Officer John Compton found Kenneth Moore lying on the ground holding the cash register. When Moore stated that he was overdosing, Officer Compton called dispatch, and an ambulance arrived to take Moore to the hospital. While at the hospital, Investigators Christopher Ware and Sam Jackson interviewed Moore, who told them that he and Antonio Ross had robbed the OK Food Store. According to Moore, Ross planned the burglary and requested his assistance. Ross told Moore that they could not stay in the store longer than fifteen seconds because Ross was wearing an ankle monitor that tracked his location. Moore stated that he threw a brick through the glass door of the store, and he and Ross ran in and stole the cash register and cigarettes. They exited the store and ran in different directions.

¶3. In order to locate Ross, the police contacted Ross's probation officer, who informed them that Ross wore an ankle bracelet because he was on probation. Through the data in the ankle bracelet, the police were able to identify Ross's locations on the morning of October

3, 2018. Ross’s ankle monitor confirmed that he was within 200 hundred feet of the OK Food Store at the time of the burglary. The police then arrested Ross.

¶4. On February 4, 2019, a Lowndes County grand jury indicted Ross for one count of burglary of a business in violation of Mississippi Code Annotated section 97-17-33.¹ Further, the indictment included a habitual-offender charge pursuant to Mississippi Code Annotated section 99-19-81 (Rev. 2015) based on the following four felonies: (1) a 1996 auto burglary (for which Ross was sentenced to serve eight years); (2) possession of cocaine in 2004 (for which Ross was sentenced to serve eight years); (3) a 2004 escape (for which Ross was sentenced to serve three years); and (4) possession of cocaine in 2017 (for which Ross was sentenced to six years of imprisonment).²

¶5. Ross’s trial took place on September 3, 2019, and September 4, 2019. Although Ross was found indigent and was appointed counsel, he chose to represent himself with his appointed counsel only assisting in the jury-selection process. Several witnesses testified on behalf of the State, including key witnesses, Moore, and investigators Ware and Jackson. At the conclusion of the State’s presentation, the circuit court then informed Ross that he had the right to testify as a witness. The court stated that Ross had at least four prior felony

¹ This section defines burglary of a business as the “breaking and entering, in the day or night, [of] any shop, store . . . in which any goods, merchandise, equipment or valuable thing shall be kept for use, sale, deposit, or transportation, with intent to steal therein.” Miss. Code Ann. § 97-17-33.

² A habitual offender is defined as “a person convicted in this state of a felony who shall have been convicted twice previously of any felony or federal crime upon charges separately brought and arising out of separate incidents at different times and who shall have been sentenced to separate terms of one (1) year or more in any state and/or federal penal institution.” Miss. Code Ann. § 99-19-81.

convictions in the State of Mississippi, but there had been no request by the State for a hearing on whether those convictions might be used at trial. The State asserted that it would move for a *Peterson*³ hearing only if Ross testified, but the circuit court stated that the motion must be made before Ross's potential testimony. Particularly, the court stated that Ross needed the information to determine whether he should testify as a witness. The State then moved ore tenus for a *Peterson* hearing to determine whether Ross's prior crimes could be used for impeachment in accordance with Rule 609 of the Mississippi Rules of Evidence.

¶6. The State presented three certified copies of Ross's prior felony crimes in Lowndes County, Mississippi: (1) a 2004 conviction for the possession of cocaine greater than one-tenth a gram but less than two grams; (2) a 2004 guilty plea to the charge of escape; and (3) a 2017 guilty plea to the charge of possession of cocaine.⁴ The State asserted that it would use the crimes to impeach Ross if he testified as a witness.

¶7. The circuit court applied the *Peterson* factors (discussed below and the factors listed in Mississippi Rule of Evidence 609) in determining whether Ross's prior felony crimes could be used to impeach him.⁵ The circuit court found that the State could not use the 2004

³ *Peterson v. State*, 518 So. 2d 632 (Miss. 1987). In such a hearing, the court would decide if the crimes could be used for impeachment.

⁴ All of Ross's felony crimes carried a separate term of one year or more in the custody of MDOC.

⁵ If more than ten years have passed since a witness's conviction, "[e]vidence of the conviction is admissible only if: (1) its probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect; and (2) the proponent gives an adverse party reasonable written notice of the intent to use it so that the party has a fair opportunity to contest its use." M.R.E. 609(b).

crimes because (1) the crimes were outside of the ten-year period; (2) the prejudicial value outweighed the probative value; and (3) the State did not give Ross the proper notice of intent to use the crimes pursuant to Rule 609. But the 2017 possession of cocaine felony was within the ten-year period. The court determined that it would allow the State to impeach Ross on the possession-of-cocaine felony if Ross testified. Ross decided not to testify, and evidence of his 2017 prior felony was never presented to the jury. He rested his case without calling any witnesses or presenting any additional evidence.

¶8. The jury found Ross guilty of burglary on September 4, 2019. Because Ross was a habitual offender, he was sentenced to serve the maximum term of seven years in the custody of MDOC without eligibility for parole.

¶9. On September 6, 2019, Ross filed a motion for judgment notwithstanding the verdict (JNOV) or a new trial, which the circuit court denied on September 16, 2019. On the same day, Ross appealed, raising the sole issue of whether the circuit court erred when it allowed the State to use his prior conviction for impeachment. After reviewing the record, we find that the circuit court did not abuse its discretion in determining that Ross’s prior felony could have been used for impeachment purposes.

Standard of Review

¶10. We review a trial court’s decision to admit or exclude evidence for abuse of discretion. *Burgess v. State*, 210 So. 3d 569, 577 (¶30) (Miss. Ct. App. 2016) (citing *Robinson Prop. Grp. v. Mitchell*, 7 So. 3d 240, 243 (¶9) (Miss. 2009)). “The relevancy and admissibility of evidence are well within the trial court’s discretion, and reversal may be had

only where that discretion has been abused.” *Id.* (citing *Bingham v. State*, 723 So. 2d 1189, 1191 (¶9) (Miss. Ct. App. 1998)).

Discussion

¶11. Ross argues that the circuit court erred by determining that the State could use his prior felony of possession of cocaine to impeach him. We disagree.

¶12. Mississippi Rule of Evidence 609(a) states the rule for attacking a witness’s character for truthfulness with evidence of a prior criminal conviction. It provides that such evidence must be:

(1) for a crime that, in the convicting jurisdiction, was punishable by death or by imprisonment for more than one year, the evidence: (A) must be admitted, subject to Rule 403, in a civil case or in a criminal case in which the witness is not a defendant; and (B) *must be admitted in a criminal case in which the witness is a defendant, if the probative value of the evidence outweighs its prejudicial effect to that defendant.*

M.R.E. 609 (emphasis added).

¶13. “Convictions offered under 609(a)(1) to impeach a party must be analyzed under the guidelines set forth in *Peterson v. State*, 518 So. 2d 632 (Miss. 1987) to determine if the probative value is great enough to overcome the presumed prejudicial effect to that party, and findings should be made on the record by the judge.” M.R.E. 609 advisory committee note. The *Peterson* factors include (1) the impeachment value of the prior crime; (2) the point in time of the conviction and the witness’s subsequent history; (3) the similarity between the past crime and the charged crime; (4) the importance of the defendant’s testimony; and (5) the centrality of the credibility issue. *Peterson*, 518 So. 2d at 636. “A crime which does not involve propensity of truthfulness may be admissible under 609(a)(1) so long as it meets the

requirements which are set forth in that rule.” *Triplett v. State*, 881 So. 2d 303, 305 (¶10) (Miss. Ct. App. 2004). Evidence of imprisonment in excess of one year is admissible for impeachment purposes “whether or not the conviction related to the witness’ veracity.” *White v State*, 785 So. 2d 1059, 1061 (¶6) (Miss. 2001).

¶14. Here, the circuit court conducted a *Peterson* analysis and made a finding on each *Peterson* factor. After reviewing the circuit court’s findings, we find no error.

A. The Impeachment Value of the Prior Crime

¶15. In *Peterson*, the Mississippi Supreme Court stated that the impeachment of the defendant by the State with proof of his prior crime had little, if any, probative value because the defendant had already testified that he had been convicted of a prior drug felony. *Peterson*, 518 So. 2d at 637. But unlike *Peterson*, in this case, the jury was wholly unaware of Ross’s prior felony unless Ross testified. The circuit court correctly determined that proof of Ross’s possession-of-cocaine felony conviction would have impeachment value should Ross choose to testify.

B. The Point in Time of the Prior Conviction and the Witness’s Subsequent History

¶16. In *Peterson*, the Mississippi Supreme Court also stated that the “freshness” of the conviction weighs in favor of its admissibility. *Id.* In *Myers v. State*, 153 So. 3d 581 (Miss. 2014), during Myers’s trial for a 2012 robbery, the court found that his 2007 drug conviction was admissible for impeachment because the conviction was recent. *Id.* at 588 (¶25). In this case, Ross pled guilty to possession of cocaine on February 27, 2017, less than two years before the crime for which he was being tried. Therefore, because the felony conviction was

still “fresh,” the circuit court properly found that this consideration weighed in favor of its admissibility.

C. The Similarity Between the Past Crime and the Charged Crime

¶17. “[A] jury is very likely to infer present guilt from [the] past conviction for a similar offense.” *Peterson*, 518 So. 2d at 637 (citing *Gordon v. United States*, 383 F.2d 936, 940 (D.C. Cir. 1967)). In *Triplett*, we stated that the defendant’s prior crimes of burglary and receiving stolen property were so similar to the crime for which he was being tried, business burglary, that the prejudicial effect of admitting the convictions was very high. *Triplett*, 881 So. 2d at 307 (¶15). But, unlike *Triplett*, in the present case, Ross’s business burglary charge and his prior possession of cocaine conviction were dissimilar crimes, weighing in favor of admitting Ross’s prior felony conviction. Therefore, the circuit court properly found that this consideration favored admissibility of Ross’s prior conviction.

D. The Importance of the Defendant’s Testimony and the Centrality of the Credibility Issue

¶18. In *Peterson*, the Mississippi Supreme Court stated that a defendant’s testimony is significant when he is one of the only witnesses who would establish his defense. *Peterson*, 518 So. 2d at 637. On the one hand, “Rule 609(a)(1) aids in the search for truth by insuring that important testimony from the defendant will not be excluded because he fears the prejudicial effect his previous conviction might have on the jury.” *Id.* But when a defendant’s testimony “stands or falls based on his credibility, the evidence which bears on his credibility is important.” In this case, apparently Ross would have been the only witness in his defense. Therefore, his prior conviction was significant in determining his credibility.

Ross had insisted on representing himself, and therefore he had put on his defense through his examination of witnesses. The jury already knew that Ross was being monitored by the Mississippi Department of Corrections on parole with a monitoring device on his ankle for some prior offense. The circuit court correctly decided that there was already evidence before the jury that would lessen the shock of him being impeached with a prior conviction.

¶19. Ultimately, through a correct analysis of the *Peterson* factors, the circuit court found that the probative value of Ross's felony outweighed any unfairly prejudicial effect. Therefore, we cannot say that the circuit court abused its discretion in determining that the evidence of Ross's prior felony could be used to impeach him. While Ross argues that he did not testify as a witness because the State would have used his prior felony to impeach him, we note that there is nothing in the record that established that Ross intended on testifying. The Mississippi Supreme Court has stated that "facts asserted to exist must and ought to be definitely proved and placed before us by a record, certified by law; otherwise, we cannot know them." *Mason v. State*, 440 So. 2d 318, 319 (Miss. 1983). On appeal, where the record is silent to a defendant's intent to testify, the issue of the defendant not testifying is without merit. *Lane v. State*, 841 So. 2d 1163, 1166 (¶9) (Miss. Ct. App. 2003) (citing *Walker v. State*, 823 So. 2d 557 (¶6) (Miss. Ct. App. 2002)). The circuit court clearly and properly made a full and proper on-the-record analysis using the *Peterson* factors to determine that Ross's prior felony may be used to impeach him.⁶

⁶ The circuit court also found that Ross had sufficient notice because the "conviction [was] also in the habitual offender language contained in [his] indictment," and he should have known not only that was he being considered as an habitual offender, but that at least one those convictions might be used to impeach him in the event he testifies as a witness.

E. Harmless Error

¶20. In *Triplett*, we stated that even if the circuit court erred in admitting a defendant’s prior conviction(s), “such error is harmless if the weight of the evidence, excluding [the] prior convictions, was substantial and proved beyond a reasonable doubt that the defendant committed the crime.” *Triplett*, 881 So. 3d at 307 (¶16). In this case, the State presented their key witness, Moore, who testified that Ross committed the burglary with him. Officer Jackson testified that Ross’s ankle monitor pinged his location within 200 hundred feet of OK Food Store at the time of the burglary. Most significantly, the jury found Ross guilty of business burglary without knowing his prior possession of cocaine felony conviction. Therefore, we cannot say the jury did not have substantial evidence that could prove beyond reasonable doubt that Ross was guilty of business burglary. Therefore, the circuit court did not abuse its discretion in determining that the evidence of Ross’s prior felony could have been used to impeach him as a witness.⁷

Conclusion

¶21. Finding that the circuit court analyzed the *Peterson* factors and properly concluded that Ross’s prior felony could be used to impeach him as witness, we affirm the court’s ruling.

¶22. **AFFIRMED.**

BARNES, C.J., CARLTON AND WILSON, P.J.J., GREENLEE,

⁷ The circuit court stated that it would give a limiting instruction to the jury regarding the impeachment. The Mississippi Supreme Court has stated that trial courts should give the jury limiting instructions, stating that prior convictions can only be used to impeach the defendant. *Peterson*, 518 So. 2d at 638.

WESTBROOKS, LAWRENCE AND McCARTY, JJ., CONCUR.