

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE CITY OF STERLING HEIGHTS,

Plaintiff-Appellee,

v

BILLY WYATT, JR.,

Defendant-Appellant.

UNPUBLISHED

June 6, 1997

No. 188293

Macomb Circuit Court

LC No. 94-002514-AR

Before: Holbrook, Jr., P.J., and Fitzgerald and Smolenski, JJ.

PER CURIAM.

Defendant appeals by leave granted a circuit court order affirming defendant's district court conviction of one count of assault and battery, Sterling Heights City Code § 35-16, and one count of resisting an officer in the performance of his duty, Sterling Heights City Code § 35-19(a). Defendant was sentenced to one year probation. We affirm in part and reverse in part.

Defendant first argues that the trial court erred by allowing an amendment to the information after trial had begun to change count I from a charge of domestic violence, § 35-4(a), to a charge of assault and battery, § 35-16. We disagree.

A trial court "may at any time before, during or after the trial amend the indictment in respect to any defect, imperfection or omission in form or substance or of any variance with the evidence." MCL 767.76; MSA 28.1016; see also *People v Stewart (On Remand)*, 219 Mich App 38, 44; 555 NW2d 715 (1996). We review a trial court's decision to amend the information to determine whether the defendant was prejudiced in his defense by the amendment or whether a failure of justice resulted. MCL 767.76; MSA 28.1016.

In this case, defendant was originally charged with a violation of § 35-4(a) of the Sterling Heights Code, which provides:

A police officer who has reasonable cause to believe that an assault or an assault and battery has taken place or is taking place and that the person who committed or is committing the assault or assault and battery, is a spouse, a former

spouse, or a person residing or having resided in the same household as the victim, may arrest the violator without a warrant, for that violation, irrespective of whether the assault or assault and battery was committed in the presence of the police officer.

After opening statements, the prosecutor requested that count I be amended to charge assault and battery under § 35-16 because the domestic violence ordinance only empowered the police to make a warrantless arrest of a suspected perpetrator of assault and battery on a spouse. Because the main element under both ordinances involves an assault and battery, with the only difference being whether the defendant is married or cohabits with the alleged victim, defendant was fully apprised of the nature of the crime with which he was charged before going to trial, and therefore was not prejudiced in his defense by the amendment. The trial court did not err in amending the information. *Stewart, supra*.

Next, defendant contends that the trial court committed error requiring reversal in precluding him from presenting his theory of the assault and battery case by not allowing him to introduce evidence through cross-examination of the complainant that she had set him up in order to be able to use his actions against him in the couple's pending divorce case. We agree.

The scope of cross-examination is a matter left to the sound discretion of the trial judge. However, that discretion must be exercised with due regard for a defendant's constitutional rights. It is improper to limit cross-examination in a way that prevents a person from placing before the jury facts from which bias, prejudice, or lack of credibility of a prosecution witness might be inferred. *People v Grisham*, 125 Mich App 280, 284-285; 335 NW2d 680 (1983). Whether a witness has filed or is contemplating a civil lawsuit, the prospects for which may be affected by the outcome of a criminal trial, is always relevant to a witness' credibility. *People v Morton*, 213 Mich App 331, 334-335; 539 NW2d 771 (1995). A claim that a denial of cross-examination has prevented the exploration of a witness' bias is subject to harmless error analysis. *Id.* at 336

In this case, defendant's attempt to cross-examine the complainant concerning his theory that she had "set him up" to be able to allege in the Friend of the Court proceedings that he was violent amounted to an attack on the credibility of the complainant and was an attempt to show her prejudice, bias, or ulterior motive. Therefore, we conclude that the trial court abused its discretion in limiting the scope of defendant's cross-examination of the complainant concerning his theory. However, the trial court went a step further than merely limiting counsel's cross-examination of defendant's wife after giving defendant an opportunity to state his theory to the jury. During closing argument, the court sustained the prosecutor's objection to defense counsel's attempt to remind the jury of defendant's theory and specifically instructed the jury to "disregard anything about the child custody and the divorce. It has nothing to do with the case." During the formal instruction of the jury, the court told the jury that it should disregard anything that he had ruled inadmissible, and instructed that arguments of counsel are not evidence. Assuming that the jury followed the court's instruction, the effect of the trial court's rulings and instructions was to deprive defendant of an opportunity to present arguments and evidence regarding his theory of the case. Because the present case depends crucially upon the credibility assigned to the various witnesses, we conclude that the error was not harmless beyond a reasonable doubt.

Defendant also raises several issues relating to the conduct of his first trial that we need only briefly address. Defendant asserts that the trial court abused its discretion by refusing to reread the testimony of Andrea Kopp, which was requested by the jurors during their deliberations. However, defendant did not object on the record to the court's alleged error. See MCR 2.516(C). Moreover, the record contains a memo signed by the district court indicating that the jury's request was discussed by the court with both attorneys, that the attorneys agreed both with the court's response and the method in which it was given to the jury, and that "[n]o objections were made by either side in the manner that this question was handled." A defendant may not acquiesce to an issue and then claim error as to that issue on appeal. *People v Barclay*, 208 Mich App 670, 673; 528 NW2d 842 (1995).

Next, defendant raises three claims with regard to the jury instruction given by the trial court in connection with defendant's charge of resisting an officer in the performance of his duties. Specifically, defendant asserts that the trial court erred (1) by defining the elements of the resisting charge to include conduct protected by the First Amendment; (2) by allowing the possibility that defendant was convicted by a nonunanimous jury; and (3), by incorrectly reciting the elements of the charge. However, defendant did not object to but rather approved the instructions given. A verdict shall not be set aside where the court fails to instruct on any point of law unless the defendant requests such an instruction. *People v Maleski*, 220 Mich App 518, 521; 560 NW2d 71 (1996). Where a defendant fails to request an instruction and does not object to the instructions as given, we review only to determine if manifest injustice resulted. *Id.* Manifest injustice is not present in this case.

Finally, defendant argues that he was subjected to an illegal arrest. Once again, defendant did not preserve this issue for appellate review. However, we will consider claims of constitutional error for the first time on appeal when the alleged error could have been decisive of the outcome. *People v Grant*, 445 Mich 535, 547; 520 NW2d 123 (1994).

Defendant admits that his warrantless arrest was authorized under City Code § 35-4(a). However, defendant asserts that his arrest without a warrant inside his home was prohibited. Indeed, the Michigan Supreme Court in *People v Oliver*, 417 Mich 366, 379; 338 NW2d 167 (1983), stated that an arrest without a warrant inside a private home is improper and unreasonable under the Fourth Amendment in the absence of exigent circumstances or *consent to entry*. Here, the complainant gave her consent to the entry by the police into the home. She called the police, waited for them in the driveway of her home, and spoke to them upon their arrival before their entry to make the arrest. Therefore, defendant's contention is without merit.

Affirmed with respect to the conviction of resisting arrest; reversed with respect to the conviction of assault and battery and remanded for a new trial on this charge only.

/s/ Donald E. Holbrook, Jr.
/s/ E. Thomas Fitzgerald
/s/ Michael R. Smolenski