STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 26, 2001
v	No. 221172 Huron Circuit Court
DAVID DUDLEY TAYLOR, Defendant-Appellant.	LC No. 99-004050-FH

Before: Sawyer, P.J., and Griffin and O'Connell, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction, following a jury trial, of first-degree home invasion, MCL 750.110a(2)(b); MSA 28.305(a)(2)(b). The trial court sentenced defendant to a term of seven to twenty years' imprisonment. We affirm.

According to the complainants, in the early morning hours of January 22, 1999, the victims were awakened when defendant and William Brian O'Connor[1] broke into the home they shared with their three young children. During the ensuing moments both the husband and wife were brutally attacked, and the wife was sexually assaulted by O'Connor. After the couple's daughter ran for help, the wife managed to retrieve an unloaded firearm from the attic in an attempt to ward off their attackers.[2] When police arrived moments later, it took repeated attempts by two uniformed officers to pull defendant off of the husband, who he was savagely attacking.

Defendant first argues that the trial court denied him of his constitutional right to confrontation by improperly limiting his cross-examination of the prosecution's key witnesses. See US Const, Am VI; Const 1963, art 1, § 20. Specifically, defendant asserts that he was not permitted to thoroughly question the victims about the potential criminal consequences of the

[1] Defendant and O'Connor were tried jointly. O'Connor was also convicted of first-degree home invasion, as well as CSC II, MCL 750.520c; MSA 28.788(3). O'Connor's appeal is pending before another panel of this Court in Docket No. 221033.

[2] The ownership of this firearm, and whether the husband was permitted to possess a firearm was a contested issue at trial.

husband possessing a firearm. According to defendant, this line of cross-examination was necessary to allow him to expose the victims' motive to fabricate their testimony. On appeal, defendant claims that the trial court abused its discretion in foreclosing defendant from questioning the husband about potential criminal consequences arising from his possession of a firearm. We disagree.

We review a trial court's decision limiting cross-examination for an abuse of discretion. *People v Crawford*, 232 Mich App 608, 620; 591 NW2d 669 (1998). We recognize that limitations on cross-examination may infringe on the constitutional right to confrontation where the defendant is prevented from placing before the jury "facts from which bias, prejudice or lack of credibility of a prosecution witness might be inferred." *People v Kelly*, 231 Mich App 627, 644; 588 NW2d 480 (1998), citing *People v Cunningham*, 215 Mich App 652, 657; 546 NW2d 715 (1996). As this Court observed in *People v Minor*, 213 Mich App 682, 685; 541 NW2d 576 (1995):

> A witness' motivation for testifying is always of undeniable relevance and a defendant is entitled to have the jury consider any fact that may have influenced the witness' testimony. [*Id.*, citing *People v Mumford*, 183 Mich App 149, 154; 455 NW2d 51 (1990).]

However, the right of cross-examination does not guarantee a defendant the right to cross-examine on any subject. *People v Canter*, 197 Mich App 550, 564; 496 NW2d 336 (1992). Rather, a trial court may properly deny cross-examination with respect to collateral matters that bear only on a witness' general credibility. *Id.*

With the foregoing principles in mind, we are satisfied that defendant's right of confrontation was not violated. After the jury was selected, defense counsel raised the issue of the scope of cross-examination of the victims. Specifically, defense counsel articulated his concern that the jury be made aware that the husband was not permitted to possess a firearm, and that he could face criminal consequences for doing so. The trial court ruled that defendant could question the witness about whether he was permitted to possess a firearm and the potential ramifications of this possession. A review of the trial court's ruling demonstrates that it was attempting to balance defendant's right to cross-examination against the need to adhere to MRE 609(a),[3] which prohibits the admission of evidence relating to a witness' prior criminal conviction to impeach credibility.[4]

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[3] Although the trial court considered the admissibility of defendant's prior convictions in a hearing before trial, it does not appear that defendant sought admission of the husband's prior criminal conviction, nor did the trial court conclusively rule on this issue. In his brief on appeal, defendant suggests that evidence of the husband's prior marijuana related conviction should not have been excluded under MRE 609(a). This argument is somewhat baffling in that a review of the record does not support defendant's contention that the evidence was excluded. In any event, defendant has waived this issue on appeal by failing to raise it below. See *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994). Nor is this issue properly before this Court because it was not included in defendant's statement of the issues on appeal. See *People v Yarbrough*, 183 Mich App 163, 165; 454 NW2d 419 (1990). MRE 609(a) provides in pertinent part:

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During his extensive cross-examination of the husband, defense counsel inquired whether he was permitted to possess a firearm, and whether he was concerned that having a firearm in his home would "create a problem" for him. Defense counsel pursued an identical line of inquiry when he cross-examined the wife. Further, in response to the wife's testimony that she owned the firearm, defense counsel asked specific details about it, presumably to raise an issue with regard to the true ownership of the firearm. Further questioning elicited testimony that the victims were concerned about the legal ramifications of possessing the firearm when they were interviewed by the police after this incident. Defense counsel also elicited testimony that the husband and defendant shared an acrimonious relationship dating back many years.

In our view, defendant was permitted to place before the jury ample facts from which the victims' potential bias, prejudice or lack of credibility might be inferred. *Kelly, supra* at 644. We do not accept defendant's contention that it was necessary for defense counsel to inquire specifically about "criminal" consequences that could arise from the husband's possession of a firearm in order for the jury to infer that the victims had motivation to fabricate their testimony. We believe that defense counsel's questioning of both the husband and wife adequately illustrated to the jury that the husband was not permitted to possess a firearm, and provided a sufficient basis for a reasonable juror to infer that the victims may have fabricated their testimony in an attempt to protect the husband from potential criminal consequences.[5] That defense

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> 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
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> (1) the crime contained an element of dishonesty or false statement, or
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> (2) the crime contained an element of theft, and
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> (A) the crime was punishable by imprisonment in excess of one year or death under the law under which the witness was convicted, and
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> (B) the court determines that the evidence has significant probative value on the issue of credibility. . . .

[5] Defendant's reliance on *Davis v Alaska*, 415 US 308; 94 S Ct 1105; 39 L Ed 2d 347 (1974); *United States v Garrett*, 542 F2d 23 (CA 6, 1976) and *People v Redmon*, 112 Mich App 246; 315 NW2d 909 (1982) is misplaced. In *Davis, supra*, the defendant was precluded from questioning a civilian witness about a prior juvenile record. Consequently, the United States Supreme Court found that "[the witness'] protestations of unconcern over possible police suspicion that he might have had a part in the . . . burglary and his categorical denial of ever having been the subject of any similar law-enforcement interrogation went unchallenged." *Davis, supra* at 314. Similarly, in *Garrett, supra*, the defendant was not permitted to question a police officer witness in a drug prosecution about the facts underlying his suspension from the police force for the use of hard drugs. *Garrett, supra* at 26. Further, the defendant in *Redmon, supra*, was prohibited from

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counsel's questioning did not render answers detailing specific *criminal* consequences arising from the possession of a firearm does not amount to a denial of the right to confrontation. See *People v Watson*, ___ Mich App ___; ___ NW2d ___ (Docket No. 218218; issued 5/4/01), slip op p 6 (right of confrontation does not guarantee successful cross-examination).

Defendant next argues that the trial court erred by refusing to instruct the jury on the defense of voluntary intoxication. After reviewing the jury instructions as a whole, we must determine whether the trial court erred to the extent that reversal is required. *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000). "Jury instructions must include all the elements of the charged offense and must not exclude material issues, defense and theories if the evidence supports them." *Id.* citing *People v Reed*, 393 Mich 342, 349-350; 224 NW2d 867 (1975) and *People v Piper*, 223 Mich App 642, 648; 567 NW2d 483 (1997). We review the jury instructions in the instant case mindful that the decision whether a certain instruction is supported by the evidence is left to the sound discretion of the trial court. *People v Ho*, 231 Mich App 178, 189; 585 NW2d 357 (1998).

In *People v Mills*, 450 Mich 61, 83; 537 NW2d 909, mod 450 Mich 1212 (1995), the defendant argued that the trial court erred by failing to instruct the jury on the defense of voluntary intoxication. Rejecting the defendant's claim that an instruction on voluntary intoxication was supported by the evidence, our Supreme Court, speaking through Justice Mallett, observed:

> A defense of intoxication is only proper if the facts of the case could allow the jury to conclude that the defendant's intoxication was so great that the defendant was unable to form the necessary intent. [*Id.* at 82, citing *People v Savoie*, 419 Mich 118; 349 NW2d 139 (1984); see also *People v King*, 210 Mich App 425, 428; 534 NW2d 534 (1995).]

In the instant case, the husband testified that he believed defendant had been drinking. Similarly, during cross-examination, his wife admitted telling the police shortly after the incident that defendant and O'Connor were "drunk as skunks." Additionally, one of the police officers

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questioning the witness in any regard about his extensive criminal history. This Court concluded that the Sixth Amendment right to confrontation took precedence over then MRE 609(b), now MRE 609(c), which prohibits the admission of evidence of a conviction "if a period of more than ten years has elapsed since the date of conviction . . . ."

In our view, the instant case is distinguishable from *Redmon*, *Garrett*, and *Davis*, because defendant was not precluded from presenting his theory of the case to the jury or challenging the witnesses' testimony. Defendant was also not prevented from pursuing a key line of questioning, rather, he was permitted to place ample facts before the jury on which a reasonable person could conclude that the victims may have had a motive to fabricate their testimony. In our opinion, defense counsel's extensive questioning of the witnesses about whether the husband was permitted to possess a firearm and whether "trouble" could ensue adequately conveyed to the jury defendant's theory that the witnesses were exaggerating the facts of the home invasion to protect the husband from potential criminal consequences.

who investigated the incident testified that he suspected defendant had been drinking and that defendant later vomited in the police vehicle.

Testifying on his own behalf, defendant claimed that he drank six beers and two shots of liquor during an approximately five-hour period while at a bar on the evening of January 21, 1999. In response to defense counsel's queries about his condition that night, defendant indicated:

> I was in a pretty good mood, I was smiling, joking around. I was – I mean, I wasn't wasted drunk, I was – I had a buzz on, I don't – I don't know how else to really explain it. I wasn't staggering, I wasn't slurring my words, but the edge was taken off, you know, I was – I don't know how to say it.

Notably, throughout direct examination and later on cross-examination, defendant gave a meticulously detailed account of his activities after leaving the bar at approximately 2:30 a.m. on January 22, 1999. Specifically, defendant testified about how he directed O'Connor to the victims' home, though it appeared defendant had not visited there before and was not familiar with the area. Defendant also gave a minute-by-minute account of the altercation that occurred between him and the husband, even detailing what hand he punched with and what specific areas he struck on the husband's body. Defendant further indicated that he walked up to the victim's house without stumbling, and that he could remember what occurred in the victims' house. Defendant further stated that he could recall being dragged away from the house in handcuffs by the police.

In our view, defendant's detailed recollection of the events giving way to this appeal and his behavior on the night in question belie his contention that an instruction on voluntary intoxication was supported by the evidence. The trial court did not err in refusing to give the requested instruction because there is no indication in the record that defendant "was incapable of forming the intent to commit this crime." *Mills*, *supra* at 83; see also *People v Coddington*, 188 Mich App 584, 604; 470 NW2d 478 (1991) (instruction on voluntary intoxication not warranted where the defendant's testimony "revealed that his drinking did not affect his behavior."); cf. *People v Gomez*, 229 Mich App 329, 333; 581 NW2d 289 (1998) (voluntary intoxication instruction not warranted where police officer merely suspected intoxication and the defendant "had no trouble landing multiple blows on the victim.").

Affirmed.

/s/ David H. Sawyer
/s/ Richard Allen Griffin
/s/ Peter D. O'Connell