

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIAM DALE SNYDER, JR.,

Defendant-Appellant.

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UNPUBLISHED  
December 6, 2002

No. 235562  
Montcalm Circuit Court  
LC No. 95-000116-FC

Before: Neff, P.J., and Hoekstra and O'Connell, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of reckless discharge of a firearm with death or injury resulting, MCL 752.861, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced as an habitual fourth offender, MCL 769.12, to consecutive prison terms of seven to fifteen years for the reckless discharge of a firearm conviction and two years for the felony-firearm conviction. Defendant appeals as of right.<sup>1</sup> We affirm the convictions, but remand for correction of the judgment of sentence.

In May 1994, the complainant, Marcia Prause, and defendant began dating. On Friday, November 11, 1994, defendant and Prause met at defendant's home for the weekend. Prause testified that she and defendant had argued earlier in the week about his job; however, for the first part of the weekend they had a good time together. At around midnight on Saturday, they again began arguing about his job. According to Prause, at about 3 a.m., defendant loaded a bullet into his rifle, and aimed it at Prause's head. When Prause saw defendant's hand move toward the trigger, she held her hand up in front of her face and the gun went off. The bullet missed Prause's head, but hit her hand and blew it apart, and she blacked out for some time.

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<sup>1</sup> This incident comes before us for the third time. After this Court affirmed defendant's original convictions in this matter for assault with intent to murder and felony-firearm in Docket No. 195666, our Supreme Court reversed and remanded for a new trial in *People v Snyder (After Remand)*, 462 Mich 28; 609 NW2d 831 (2000). On retrial, defendant was convicted of the instant offenses, and the present case is his appeal from the retrial.

In Docket No. 200325, this Court also affirmed defendant's separate conviction for the offense of being a felon in possession of a weapon, arising out of the same incident as the case at bar.

When Prause awoke, defendant was standing over her telling her repeatedly that she was not dead. She stood up and applied a makeshift tourniquet to her bleeding hand. Prause said she told defendant to drive her to the hospital, and when they arrived, defendant opened her side door, pushed her out of the car, and drove away. Prause was able to get up and walk into the hospital, where she was treated and transferred to another hospital for further treatment.

Defendant testified that Prause had asked him to shoot a deer for her during the weekend. Defendant contended he was cleaning a rifle on Saturday evening and that after they finished arguing about his job, he saw three deer approaching his bait piles outside. He testified that before he reached the door, Prause grabbed the rifle and told him to listen to her. They struggled over the gun, and it accidentally went off, hitting Prause in the hand. Defendant stated he wrapped the wound and drove Prause to the hospital, telling her he would drop her off but was not going to stay. Defendant stated he could not stay because he was on parole and he worried that the police would not believe the shooting was an accident.

On cross-examination, Marvin Brock, defendant's brother-in-law, testified over defendant's objections regarding a conversation with defendant's mother, Bernice Snyder. Bernice told Brock that defendant had called her from "down south" and told her, "I'll call when I drop the car off, and they won't take me alive." On redirect, Brock conceded that it might have been his aunt who told him this, and that he was not on good terms with defendant. Bernice had previously testified repeatedly that she could not remember whether she and defendant had this conversation, and did not remember telling Brock about any conversation with defendant. Bernice did state that she talked to defendant once on the phone before he was arrested and after the shooting, but she could not remember what they talked about.

After defendant was convicted, he was sentenced as an habitual fourth offender to consecutive prison terms for the two convictions.

The first issue in this case is whether Brock's testimony was improper impeachment of Bernice's testimony using extrinsic evidence of a collateral matter. This issue concerns Bernice's previous testimony that she did not recall the conversation with defendant where he stated that the police would never "take" him "alive." We conclude that the admission of this evidence was proper.<sup>2</sup>

Evidentiary rulings are reviewed on appeal for an abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). MRE 613(b) provides in relevant part:

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<sup>2</sup> We note that, contrary to plaintiff's argument, the defense preserved this objection for appeal by arguing at trial that the challenged testimony was improper impeachment of someone who had not testified to remembering the statement, and by requesting that the testimony be stricken. See *People v Furman*, 158 Mich App 302, 329-330; 404 NW2d 246 (1987); (evidentiary objections must be timely and specify the same ground for challenge as on appeal); *People v Harris*, 158 Mich App 463, 466; 404 NW2d 779 (1987) (ordinarily, an objection to evidence should be accompanied by a request for a curative instruction).

Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require. . . .

See also *People v Barnett*, 165 Mich App 311, 315; 418 NW2d 445 (1987) (lack of foundation for impeachment made testimony inadmissible); *People v Sutherland*, 149 Mich App 161, 165-166; 385 NW2d 637 (1985), and *People v Teague*, 411 Mich 562, 566; 309 NW2d 530 (1981) (impeachment by extrinsic evidence on a collateral matter was improper). However: “As a general principle, a witness’s bias or prejudice may be shown by extrinsic evidence, since ‘particular conduct and circumstances form the only means practically available for effectively demonstrating the existence of bias.’” *People v Perkins*, 116 Mich App 624, 628; 323 NW2d 311 (1982), quoting 3A Wigmore, Evidence (Chadbourn rev), § 948, p 784. A “collateral fact” is defined as one “not directly connected to the issue in dispute . . . .” Black’s Law Dictionary (7th ed).

This Court has held that evidence of flight is relevant and admissible. *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995). Thus, we hold that the testimony that defendant called from “down south” and said that the police would not “take” him “alive” was admissible as relevant to the issue of flight. Therefore, it was not collateral. Furthermore, in this case, the witness, Bernice, was afforded an opportunity to explain or deny that defendant called her, and she essentially denied it, saying that she remembered talking to defendant at some point, but did not remember what about. See MRE 613(b).<sup>3</sup>

With regard to the second issue appeal, both parties state on appeal that defendant was improperly sentenced to consecutive instead of concurrent terms for his reckless discharge of a firearm and felony-firearm convictions. In particular, defendant was charged with a felony, but was ultimately convicted of a misdemeanor. Defendant acknowledges that he was properly sentenced to a longer prison term because of the felony-firearm conviction and his fourth habitual offender status, despite the underlying misdemeanor conviction. However, defendant argues, the trial court made the sentences consecutive, and they are required to be concurrent.

We review a sentencing issue de novo on appeal. *People v Alexander*, 234 Mich App 665, 675; 599 NW2d 749 (1999). “A consecutive sentence may be imposed only if specifically authorized by statute.” *Id.* MCL 750.227b provides that on conviction of felony-firearm, the term of imprisonment “shall be served consecutively with and preceding any term of imprisonment imposed for the conviction of the *felony* or the attempt to commit the felony.” [Emphasis added.] See also *People v Clark*, 463 Mich 459, 463-464; 619 NW2d 538 (2000).

The plain language of the statutes involved, considered in light of the purposes sought to be accomplished, leads us to conclude that the Legislature intended two-year misdemeanors to be considered as misdemeanors for purposes of the Penal

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<sup>3</sup> Even if this evidence was improperly admitted, we would conclude that it was nonconstitutional harmless error given the other evidence admitted at trial. See *People v Lukity*, 460 Mich 484, 492-493; 596 NW2d 607 (1999).

Code, but as felonies for purposes of the Code of Criminal Procedure's habitual-offender, probation, and consecutive sentencing statutes. [*People v Smith*, 423 Mich 427, 434; 378 NW2d 384 (1985).]

The felony-firearm statute appears in the Penal Code, where a two-year misdemeanor remains a misdemeanor. See *id.* Thus, a two-year misdemeanor is insufficient to invoke the felony-firearm consecutive sentencing provision. See also *People v Williams*, 243 Mich App 333, 335; 620 NW2d 906 (2000); *People v Baker*, 207 Mich App 224, 225; 523 NW2d 882 (1994). Because the underlying conviction here was a misdemeanor, defendant should have been sentenced to concurrent terms and remand for correction of the judgment of sentence is required.

Affirmed, but remanded for correction of the judgment of sentence. We do not retain jurisdiction.

/s/ Janet T. Neff  
/s/ Joel P. Hoekstra  
/s/ Peter D. O'Connell