[Cite as *State v. Au*, 2010-Ohio-4418.]

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	
	:	Hon. Sheila G. Farmer, P.J.
Plaintiff-Appellee	:	Hon. John W. Wise, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	Case No. 09-CA-108
DAVID L. AU	:	
	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Delaware County Court of Common Pleas Case No. 09-CR-I-04-240
JUDGMENT:	AFFIRMED IN PART; REVERSED AND REMANDED IN PART
DATE OF JUDGMENT ENTRY:	September 15, 2010

APPEARANCES:

For Plaintiff-Appellee:

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BRENDAN M. INSCHO 0083269
Assistant Prosecuting Attorney
(Counsel of Record)

For Defendant-Appellant:

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Delaney, J.

{¶1} Defendant-Appellant, David Au, appeals his conviction of one count of theft, a misdemeanor of the first degree, in violation of R.C. 2913.02. The State of Ohio is Plaintiff-Appellee.

{¶2} On April 9, 2009, Appellant met up with his friend, Seth Coulter, who had just returned from appearing on the "Steve Wilkos Show" in Chicago, Illinois. Coulter had received two checks for appearing on the talk show, totaling approximately $150.00 and informed Appellant that he wanted to "party" with him when he returned to Delaware, Ohio.

{¶3} Upon arriving in Delaware on April 9, Coulter met Appellant and Appellant drove Coulter around in Appellant's white Ford Explorer so that Coulter could attempt to cash the checks.

{¶4} Appellant and Coulter met their friend, Justin Masterson, at the Kroger grocery store on South Sandusky Street in Delaware. Coulter and Masterson engaged in a brief argument because Coulter did not want to sit in the backseat of the car since he was paying for their celebration that night. He then walked across the street to a Check Smart location, where he had been to cash checks before, and approached Maha Russ to cash his checks.

{¶5} Russ recalled that Coulter handed her one check for $100.00 and after taking out the fees for cashing the check, she gave him $93 or $94. She stated that she recognized Coulter from previous interactions with him. She also testified that towards the end of the interaction, Appellant walked into the store. She recognized Appellant

because he had also been into Check Smart before. Coulter and Appellant left the store together and she watched them get into a white SUV.

{¶6} After leaving the Check Smart, Appellant drove down Bernard Street. Coulter was in the front seat and Masterson was in the back seat, talking on his cell phone. Approximately two blocks down the road, Appellant stopped the car, grabbed the money out of Coulter's hand and told him to get out of the car. According to Coulter and Masterson, Appellant began to threaten Coulter, so Coulter got out of the vehicle and fled back to the Check Smart, where he went in and told Russ that his friend had just robbed him. Russ called 911 and reported the robbery to the police.

{¶7} Detective Benjamin Segaard arrived at the scene and spoke with Coulter regarding the events that had just occurred. Approximately a half hour later, Appellant and Masterson were still driving around in the white SUV when they were apprehended by Delaware police officers with $124 in their possession.

{¶8} Appellant waived his Miranda rights and spoke to police officers, initially denying being with Coulter that day and also denying being in the Check Smart with Coulter. He later admitted that he was with Coulter, but stated that Coulter owed him gas money.

{¶9} Appellant also testified at trial that his mother, Heidi Bennet, gave him $70 on the morning of April 9, 2009, and that he paid $5 for gas that morning prior to picking up Coulter.

{¶10} On July 24, 2009, the Delaware County Grand Jury indicted Appellant on one count of robbery, a felony of the second degree, in violation of R.C. 2911.02(A)(2). Appellant pled not guilty to the charge and proceeded to jury trial on October 29, 2009.

{¶11} Prior to trial, the State filed a motion in limine to preclude the defense from mentioning any possible purchase of marijuana by Coulter or Masterson on April 9, 2009. The State argued that permitting such a reference would be unduly prejudicial, would be irrelevant to the disposition of the case, and that it would be impermissible as a bad act under Evid. R. 404. Appellant argued that he should be allowed to cross-examine Masterson on that issue to show that Masterson had a motive to cooperate by giving a statement against Appellant. The trial court tentatively ruled in favor of the State but stated that it would not limit cross-examination on the issues of bias and motive.

{¶12} At the close of the trial, the jury deliberated and indicated that they were unable to come to a verdict regarding Appellant's guilt. They were given the Howard charge and told to return to deliberate further. The jury then returned a verdict of not guilty on the charge of robbery, but guilty as to the lesser-included offense of theft, a misdemeanor of the first degree, in violation of R.C. 2913.02. Appellant was sentenced to six months in jail.

{¶13} Appellant raises two Assignments of Error:

{¶14} "I. APPELLANT'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO CONFRONT THE WITNESSES AGAINST HIM WERE VIOLATED WHEN THE TRIAL COURT RESTRICTED HIS ABILITY TO EXPLORE MOTIVE AND BIAS DURING CROSS-EXAMINATION.

{¶15} "II. THE TRIAL COURT ERRED BY SENTENCING APPELLANT TO SIX MONTHS IN JAIL WHEN R.C. 2929.249(A)(1) ONLY AUTHORIZES A MAXIMUM JAIL TERM OF 180 DAYS FOR A FIRST DEGREE MISDEMEANOR."

I.

{¶16} In his first assignment of error, Appellant argues that his right to confront witnesses was violated because he was limited in his cross-examination of State's witnesses. We disagree.

{¶17} Trial courts are granted broad discretion with respect to the admission or exclusion of evidence at trial. *State v. Sage* (1987), 31 Ohio St.3d 173, 180, 510 N.E.2d 343, 348. Thus, an appellate court will not reverse a trial court's ruling absent an abuse of discretion. *State v. Myers*, 97 Ohio St.3d 335, 348, 2002-Ohio-6658, ¶75. "The term 'abuse of discretion' connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. Absent an abuse of discretion resulting in material prejudice to the defendant, a reviewing court should be reluctant to interfere with a trial court's decision in this regard. *State v. Hymore* (1967), 9 Ohio St.2d 122, 224 N.E.2d 126.

{¶18} Appellant argues specifically that he was denied the right to effective cross-examine Justin Masterson because he was not allowed to question Masterson about his intent to purchase marijuana, his possession of drug paraphernalia, and regarding the possibility that Masterson could incur drug-related charges if he failed to cooperate with the police.

{¶19} Cross-examination is the primary means by which the credibility of a witness is tested. *Davis v. Alaska* (1974), 415 U.S. 308, 316, 94 S.Ct. 1105. One way to impeach a witness is to introduce evidence of a prior criminal conviction of that witness. "By so doing the cross-examiner intends to afford the jury a basis to infer that

the witness' character is such that he would be less likely than the average trustworthy citizen to be truthful in his testimony. The introduction of evidence of a prior crime is thus a general attack on the credibility of the witness." *Davis*, supra, at 316. "A more particular attack on the witness' credibility is effected by means of cross-examination directed toward revealing possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand. The partiality of a witness is subject to exploration at trial, and is 'always relevant as discrediting the witness and affecting the weight of his testimony.' (Citation omitted)." Id.

{¶20} Exposing a witness' motivation in testifying is a proper and important function of the right of cross-examination. *Greene v. McElroy*, 360 U.S. 474, 496, 79 S.Ct. 1400, 1413, 3 L.Ed.2d 1377 (1959).

{¶21} In the present case, Appellant was permitted to cross-examine Masterson regarding his credibility, bias, and motive for testifying. He cross-examined him on his prior convictions for domestic violence as well. Specifically, during cross-examination, trial counsel and Masterson had the following exchange:

{¶22} "Q: Now you felt when you were in the presence of Officer Segaard that you were under arrest; did you not?

{¶23} "Mr. Inscho: Objection.

{¶24} "A: No I did not.

{¶25} "The Court: Overruled.

{¶26} "Q: You did not?

{¶27} "A: No, I did not.

{¶28} "Q: Do you remember telling Office [sic] that, "I know I'm in trouble. I just want to help myself and be helped in return." Words to that effect. And he said he couldn't give you any promises?

{¶29} "A: I don't recall that, No." (Tr. 72).

{¶30} Counsel revisited the same line of questioning a few moments later:

{¶31} "Q: Were you very afraid that you were going to be arrested when you gave your statement to Officer Segaard?

{¶32} "A: I wasn't afraid of being arrested. I don't necessarily like being handcuffed period, sir, you know.

{¶33} "Q: During that interview, you weren't handcuffed; were you?

{¶34} "A: We were handcuffed until we went down to the station. They cuffed us. I am not comfortable being cuffed, like I'd already been incarcerated back in 2007. I had just gotten out January 11th of this year for the domestic violence that I was convicted of. It's not a very comforting situation for me at all.

{¶35} "Q: You didn't get out of the car and walk away when you saw what was happening; did you?

{¶36} "A: No, I didn't. I decided to stay out of it. I chose not to take sides.

{¶37} "Q: And you took the money that you're saying Mr. Au gave you?

{¶38} "A: Yes, I did take the money that he handed me. He told me not to say anything about it. He didn't want me doing anything about it and pretty much I wasn't planning on doing anything. I didn't want to be in the situation; I didn't want to be between it; I didn't want any part of it.

{¶39} "Q: So you were hoping, during your statement, as a result of your statement, they wouldn't file charges against you; is that correct?

{¶40} "Mr. Inscho: Objection.

{¶41} "The Court: Overruled. * * *

{¶42} "Q: As a result of you proceeding and cooperating with the police, giving your statement, you were hopeful in turn that you would not be charged with any crime?

{¶43} "A: They had told me that it did not look good on my part being in between that situation and they said it would help me out if I would participate. And I chose to participate." (Tr. 82-84).

{¶44} Additionally, trial counsel attacked Masterson's credibility during closing argument. Specifically, he stated, "The State's witnesses, Mr. Masterson, a prior domestic violence felony; Mr. Coulter, the alleged victim, had a theft and a F-4, Carrying A Concealed Weapon. Hard to believe any version of what those gentlemen would tell you. That's why we're almost dealing with fiction. There's no way to believe any of them with any reasonable certainty. Mr. Masterson, and I think this is the key, one of the keys, never mentions when he's meeting with the officer on April the 9th in his statement or on the video oral statement that Detective Segaard testified to, never mentioned anything about any threats." (Tr. 177-178).

{¶45} Additionally, he stated during closing, regarding Masterson's testimony, "It just doesn't make any sense. Something is wrong and it's wrong because it was made up and later on, the testimony by Masterson, keep in mind, Masterson never said anything on April 9th in the statement or on the video to Officer Segaard." (Tr. 182).

{¶46} A trial court can impose reasonable limits upon cross-examination: “[i]t does not follow, of course, that the Confrontation Clause of the Sixth Amendment prevents a trial judge from imposing any limits on defense counsel's inquiry into the potential bias of a prosecution witness. On the contrary, trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant. And as we observed earlier this Term, ‘the Confrontation Clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.’ *Delaware v. Fensterer* (1985), 474 U.S. 15, 20, 106 S.Ct. 292, 88 L.Ed.2d 15 (per curiam) (emphasis in original).” *Delaware v. Van Arsdall* (1986), 475 U.S. 673, 678-679, 106 S.Ct. 1431, 89 L.Ed.2d 674.

{¶47} In determining whether the confrontation clause has been violated, the focus of the prejudice inquiry “must be on the particular witness, not on the outcome of the entire trial.” *Van Arsdall*, supra 475 U.S. at 680. In *Van Arsdall*, supra, the U.S. Supreme Court held: “[w]e think that a criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby ‘to expose to the jury the facts from which jurors ... could appropriately draw inferences relating to the reliability of the witness. *David v. Alaska*, supra, at 318, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347.” *Van Arsdall*, supra at 475 U.S. 680.

{¶48} In this case, the jury was informed that Masterson had a prior conviction, and that he had a motive for cooperating with the police, including the fact he would not be charged with any crime if he cooperated in the investigation. We find that the jury had sufficient credible evidence from which to determine any bias of the witness for the State. In applying the factors set forth in *Van Arsdall*, supra, the trial court's refusal to permit cross-examination of Masterson on the contested drug issues to demonstrate further bias was within the trial court's discretion. Accordingly, Appellant's right to confront his accuser pursuant to the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Ohio Constitution were not violated.

{¶49} Appellant's first assignment of error is overruled.

II.

{¶50} In Appellant's second assignment of error, he argues that the trial court erred in sentencing Appellant to a jail term of six months for a first-degree misdemeanor. Appellant argues that the maximum jail term for a first-degree misdemeanor is 180 days and that a six month sentence exceeded the maximum of 180 days by two days. The prosecution concedes this point and has agreed that the case should be reversed for a resentencing hearing. Accordingly, we reverse this matter for a resentencing hearing in accordance with 2929.24(A)(1).

{¶51} For the foregoing reasons, this matter is affirmed in part and reversed in part. This matter is remanded to the trial court for a resentencing hearing.

By: Delaney, J.

Farmer, P.J. and

Wise, J. concur.

HON. PATRICIA A. DELANEY

HON. SHEILA G. FARMER

HON. JOHN W. WISE

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FIFTH APPELLATE DISTRICT

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-vs-	:	JUDGMENT ENTRY
	:	
DAVID L. AU	:	
	:	
Defendant-Appellant	:	Case No. 09-CA-108
	:	

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Delaware County Court of Common Pleas is affirmed in part and reversed in part. Costs assessed equally to Appellee and Appellant.

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HON. PATRICIA A. DELANEY

_____
HON. SHEILA G. FARMER

_____
HON. JOHN W. WISE