

No. 08-3155

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

SIXTH DIVISION
January 28, 2011

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

| | | |
|--------------------------------------|---|---------------------|
| THE PEOPLE OF THE STATE OF ILLINOIS, |) | Appeal from the |
| |) | Circuit Court of |
| Plaintiff-Appellee, |) | Cook County. |
| |) | |
| v. |) | Nos. 07 CR 20457 |
| |) | 07 CR 20459 |
| |) | |
| JOEL VELEZ, |) | Honorable |
| |) | John J. Moran, Jr., |
| Defendant-Appellant. |) | Judge Presiding. |

PRESIDING JUSTICE GARCIA delivered the judgment of the court.

Justices Cahill and McBride concurred in the judgment.

O R D E R

HELD: No abuse of discretion by the trial court or prejudice accruing to defendant from denial of motion in *limine* requesting cross-examination of eyewitness on prior misdemeanor conviction where evidence of guilt was overwhelming; judgment affirmed.

Following a bench trial, the court found defendant Joel Velez guilty of the armed robbery and attempted armed robbery of Esperanza Zarazoga, and subsequently sentenced him to concurrent, respective terms of 20 and 10 years' imprisonment. On appeal, defendant contends that the court erred in denying his motion in *limine* to cross-examine an eyewitness about the fact that he was under sentence for a misdemeanor DUI conviction, thereby curtailing his constitutional right to expose the witness' motive, bias, or interest.

The charges filed in this case stemmed from two incidents, 11 days apart, where defendant accosted Zarazoga, a produce street vendor, on the northwest side of Chicago. During the second incident, Rafael Villegas was alerted to the situation by Zarazoga's screams, pursued defendant to a house on Austin Boulevard, and later identified him to police.

Prior to trial, defendant filed a motion in *limine* seeking to cross-examine Villegas about his sentence of conditional discharge resulting from a misdemeanor DUI conviction. He argued, based on *Davis v. Alaska*, 415 U.S. 308, 39 L. Ed. 2d 347, 94 S. Ct. 1105 (1974), that Villegas was in the vulnerable status of a probationer, which impacted his credibility and provided a motive for him to testify falsely. The court denied defendant's motion, finding that Villegas' conviction did not carry a term of imprisonment that exceeded one year or deal with truth or

veracity, and, therefore, did not fall within the rules outlined in *People v. Montgomery*, 47 Ill. 2d 510, 519 (1971). The court, however, provided defendant the opportunity to obtain an affidavit from the State that no promises had been made to Villegas on any case, or to the effect that Villegas had violated the terms of his probation. Without such evidence, the court barred defendant from cross-examining Villegas about any of the misdemeanor convictions.

At trial, Zarazoga testified, through an interpreter, that on September 10, 2007, defendant robbed her at gunpoint as she sold vegetables from a cart on a Chicago sidewalk. She explained that defendant was wearing a dark hoody and a jacket when he approached her and asked to buy some corn. As she prepared the corn, he pointed a large silver gun at her waist, said "give me all your money" and threatened to "put a bullet in her." She gave him the \$150 to \$175 in her apron and he fled.

Immediately after the robbery, Zarazoga spoke with her friend Jenny Alvarez, who had been around the corner from the robbery, and asked if she had seen anybody running past her. Alvarez also helped her call, and speak to, the police after the robbery, but they were unable to locate defendant at that time.

Eleven days later, defendant again attempted to rob Zarazoga. As he walked toward her with his face partially obscured, Zarazoga immediately recognized him as the man who had

robbed her. She then ran away from him, and defendant chased her, grabbing at his waistband, saying "lady, lady, give me all your money." Although she saw him grab at his waistband, she did not see whether he actually had a gun.

Zarazoga further testified that Rafael Villegas and Renee Rodriguez, two men she had known from the neighborhood, ran across the street and chased defendant away from her. Several minutes later, the police brought defendant back to the scene and she identified him as the man who had previously robbed her and also attempted to rob her that day.

Villegas testified that he saw defendant running after Zarazoga and he chased defendant away from her. He related that he was painting a house with his uncle, Rodriguez, in a gangway across the street from the incident when he heard Zarazoga scream "no, no, he's trying to rob me." Villegas looked out toward the street and saw defendant, clad in a black hoody, chasing Zarazoga. He and Rodriguez chased defendant to the mouth of an alley, where defendant pulled a silver semi-automatic pistol from his waistband, told them to get back, and ran off. Rodriguez stayed behind, but Villegas continued to follow defendant until the police stopped him. Several minutes later, Villegas identified defendant as the man who had tried to rob Zarazoga.

Rodriguez corroborated Villegas' testimony as to the chronology of events, and added that he returned to talk with

Zarazoga when Villegas continued the chase. About 10 minutes later, he also identified defendant to police.

Jenny Alvarez testified that she formerly lived in the neighborhood where Zarazoga sold her food and saw defendant running from the scene of the first robbery. Prior to that, defendant had passed her on the sidewalk wearing a dark jacket and hoody. While she was sitting on her front porch, she saw defendant drive off in a blue four-door Ford parked in front of her house. Less than a minute later, she saw Zarazoga shaking, crying, and saying she had just been robbed. Zarazoga described the man who had just robbed her, and Alvarez told her, "that's the dude that I just seen that left in that blue car." Alvarez stayed with Zarazoga while she met with police and translated for her. Alvarez later identified the blue Ford for police, and the officer who recovered the car found a pill bottle inside of it bearing defendant's name.

The court found defendant guilty of the offenses as charged, noting that the evidence against him was overwhelming. Defendant filed a motion for a new trial, in which he alleged, *inter alia*, that the court improperly denied his motions in *limine*. The court denied the motion and entered judgment on the findings.

On appeal, defendant does not contest the sufficiency of the evidence to sustain his convictions, but contends that the court improperly curtailed his right to expose Villegas' motive, bias,

or interest when it denied his motion in *limine* seeking to cross-examine Villegas about his sentence of conditional discharge imposed on a misdemeanor DUI conviction. Defendant specifically asserts that the court erred in relying on *Montgomery*, instead of *Davis*, when it decided the motion, and that this error violated his constitutional right to confrontation, requiring reversal and remand.

In *People v. Sanders*, 143 Ill. App. 3d 402, 407 (1986), this court observed that impeachment of a witness' credibility on the basis of bias, interest, or motive to testify falsely is distinguishable from impeachment by proof of conviction of a prior crime. Impeachment by proof of conviction is governed by the principles set forth in *Montgomery*, 47 Ill. 2d at 519, which generally require that the prior conviction be for crimes punishable by death or imprisonment for greater than one year or for crimes involving dishonesty or false statement. *Sanders*, 143 Ill. App. 3d at 407. On the other hand, cross-examination to show bias or motive to testify falsely is a matter of right, subject only to the court's broad discretion to preclude repetitive or unduly harassing interrogation and to confine the cross-examination to proper subject matter. *Sanders*, 143 Ill. App. 3d at 407.

In this case, defendant sought to question Villegas about his bias or motive to falsely testify based on his status as a

probationer. In his written motion in *limine* and counsel's argument at the hearing, defendant maintained that Villegas' vulnerable status as a probationer warranted cross-examination of his sentence under *Davis*. The court, however, reviewed the motion as a request to impeach Villegas using the proof of his conviction, and in its ruling, explicitly referenced *Montgomery* and the rules therein. We find the court's reliance on *Montgomery* misplaced because the situation did not involve impeachment by conviction (*Sanders*, 143 Ill. App. 3d at 407); but, for the reasons to follow, we find no error in the court's ultimate decision to preclude the cross-examination on the misdemeanor convictions in this case.

A defendant in a criminal prosecution has the right to cross-examine a witness regarding his bias, interest, or motive to testify falsely; however, the evidence used to impeach the witness must give rise to the inference that the witness has something to gain by his testimony. *People v. Leak*, 398 Ill. App. 3d 798, 822 (2010). The evidence cannot be remote or uncertain, but, rather, must be directly related to the issue of bias or motive to testify falsely. *Sanders*, 143 Ill. App. 3d at 407. The scope of cross-examination is within the sound discretion of the trial court and a reviewing court will not interfere unless there has been a clear abuse of discretion

resulting in manifest prejudice to defendant. *Leak*, 398 Ill. App. 3d at 822.

In this case, defendant maintains that Villegas had a motive to testify falsely in order to "curry favor with the State," in the form of more lenient terms of probation, more lax enforcement of the terms of probation, or mercy in the event he violated probation. The State responds that defendant waived any argument because he failed to make an offer of proof.

This court has held that when a line of questioning is objected to or denied by the court, a defendant must set forth an offer of proof to either convince the court to allow the testimony or establish on the record that the evidence was directly and positively related to the issue of bias or motive to falsely testify. *People v. Tabb*, 374 Ill. App. 3d 680, 689 (2007). The record here shows that defendant did not make a pre-trial offer of proof, outside of the conclusory statement that Villegas was serving a term of probation, to bolster his claim that he was vulnerable to the State. Defendant also provided no details as to how Villegas was " beholden to the State," or support for his bare allegations regarding Villegas' veracity during trial or the post-trial proceedings. In short, the record is devoid of support that would raise an inference that Villegas' sentence of conditional discharge caused him to be biased or have motive to testify falsely. *Sanders*, 143 Ill. App. 3d at 409.

Accordingly, the facts of this case do not provide support for defendant's claim or implicate constitutional protections. *Tabb*, 374 Ill. App. 3d at 690.

Defendant, nevertheless, maintains that *Davis* controls the outcome here. We disagree, and find *Davis* inapplicable.

Davis, unlike here, was a jury trial, and the witness' motive or bias was clear: he was serving probation as a result of a juvenile adjudication for grand larceny, the same offense with which defendant had been charged. Police, aware of his probation and after recovering evidence related to defendant's offense from near the witness' home, suspected the witness.

In this case, Villegas' DUI conviction had no connection with, or similarity to, the offenses with which defendant had been charged, and police never had reason to suspect that Villegas was somehow involved given the circumstances surrounding the incident. Thus, defendant's bare allegation does not rise to the level of directness or certainty required for admissibility (*Sanders*, 143 Ill. App. 3d at 409); and, accordingly, the limitation imposed by the trial court did not constitute an abuse of discretion (*Leak*, 398 Ill. App. 3d at 823).

Moreover, even if we were to hold that the court improperly precluded the cross-examination of Villegas, the preclusion would not be sufficiently prejudicial to warrant a new trial. *Tabb*, 374 Ill. App. 3d at 690. The record clearly shows that two

eyewitnesses in addition to Villegas, including the victim, identified defendant as the attempted robber. Zarazoga also identified defendant in the initial robbery, an identification that was bolstered by Alvarez' testimony related to the blue Ford. See *In re M.W.*, 232 Ill. 2d 408, 435 (2009), citing *People v. Piatkowski*, 225 Ill. 2d 551, 566 (2007) (the testimony of a single eyewitness who had an opportunity to observe a defendant is sufficient to sustain a conviction). These witnesses were not impeached as to the identity of the offender or on the elements of the charged offenses, and given the court's determination that the evidence against defendant was overwhelming, the court apparently found these witnesses to be credible. Accordingly, any error by the court in limiting the cross-examination of Villegas would be harmless. *Tabb*, 374 Ill. App. 3d at 691.

For the reasons stated, we affirm the judgment of the circuit court of Cook County.

Affirmed.