

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

UNPUBLISHED

Plaintiff-Appellee,

v

No. 183222

St. Clair Circuit Court

DONALD LEE THIEKE, JR.,

LC No. 94-002432-FH

Defendant-Appellant.

Before: Markman, P.J., and Smolenski and G. S. Buth,* JJ.

MARKMAN, P.J., (concurring).

I concur in the results of the majority opinion but write separately in order to elaborate on why, in my judgment, the circuit court did not abuse its discretion when it limited cross-examination of defendant's brother, David Thieke.

On cross-examination, David Thieke was questioned as to whether the reason that he did not like defendant was that defendant had accused David of molesting his daughter. The prosecutor objected to the question and the court sustained the objection. Before the trial court could rule on the objection, however, David answered the question, testifying that it would be fair to say that the reason that he did not like defendant was because of this accusation. The trial court allowed the answer to stand. Later, when defendant was on the stand, defense counsel attempted to ask him why he and his brother did not get along. The prosecutor again objected, arguing that the court had prevented the same line of questioning with David Thieke. The trial court sustained the objection.

Defendant now argues that evidence concerning both the charge of CSC against David relating to defendant's daughter, and the conviction for CSC relating to defendant's girlfriend's brother, should have been admitted because this would have established that David resented defendant for being associated with these matters.¹ As a result, defendant contends that David was motivated by revenge to testify against him and implicate him in the instant crime. Defendant argues that the court abused its discretion in precluding defendant's cross-examination of his brother directed toward such matters.

* Circuit judge, sitting on the Court of Appeals by assignment.

First, defendant relies upon this Court's decision in *People v Adamski*, 198 Mich App 133; 497 NW2d 546 (1993), in support of the proposition that defendant is to be accorded a broad range within which to explore questions of bias: in this instance, his brother's bias. This is undoubtedly true. However, *Adamski* also holds expressly that "Trial judges retain wide latitude . . . to impose reasonable limits on such cross-examination . . ." See also *People v Holliday*, 144 Mich App 560, 566; 376 NW2d 154 (1985).

Second, it was well established at trial by both the testimony of David Thieke and Kimberly Thieke that defendant and his brother did not get along. Moreover, on two occasions, the trial court allowed to stand defense counsel's questions regarding the reasons for David's dislike of defendant as well as David's answer that it stemmed from defendant's involvement in the earlier child abuse charges against David.

Third, it was only with respect to the David's CSC conviction involving the brother of defendant's then-girlfriend that the trial court effectively limited defendant's efforts to impeach David. Regarding the allegation involving defendant's daughter, which did not apparently result in a conviction, the jury was informed of the alleged bias because David answered before the court sustained the prosecutor's objection to this cross-examination.² See *Holliday*, *supra* at 570.

Fourth, since David's crime did not involve elements of fraud or theft, cross-examination regarding prior convictions of witnesses is generally prohibited under MRE §609. Although I disagree with the prosecutor's characterization of *People v Allen*, 429 Mich 558; 420 NW2d 499 (1988), to the effect that prior convictions for non-theft crimes are never admissible even to establish bias,³ the trial court's discretion nevertheless is substantial in judging the propriety of admitting evidence of such crimes.

Fifth, the trial court provided accomplice instructions that reminded the jury of David's potential biases and admonished the jury to view his testimony with special scrutiny.

Finally, I believe that the defendant over-emphasizes the extent to which the instant case hinged strictly upon a credibility contest between defendant and his brother. Detective LaRue's own investigation identified not only David as a potential suspect in the larceny, but also defendant himself. Evidence demonstrated that defendant spent unusually large amounts of money immediately following the individual criminal episodes. Despite defendant's assertions to the contrary, it is clear that Detective LaRue came to identify defendant as a suspect independent of David's corroboration.⁴

For these reasons, I do not believe that the trial court abused its discretion in its various decisions regarding defendant's cross-examination of his brother.

/s/ Stephen J. Markman

¹ It does not appear from the record that David was ever convicted of CSC with respect to defendant's daughter.

² Further, this Court has held that information regarding acts of sexual intercourse or CSC with third persons is irrelevant to show bias on the part of a witness. *People v Walker*, 81 Mich App 202, 208; 265 NW2d 82 (1978). Thus, the conviction for the sexual abuse of defendant's girlfriend's brother by David was not necessarily probative of David's bias against defendant.

³ This Court has stated, for example, that there is no bright line rule even when it comes to the use of evidence of arrests not resulting in convictions to establish the bias of witnesses against the defendant. *People v Yarbrough*, 183 Mich App 163; 454 NW2d 419 (1990).

⁴ Defendant claims that Detective LaRue's testimony was hearsay and that it therefore cannot be considered in determining whether the credibility contest between David and defendant was critical. However, while David did tell Detective LaRue that defendant committed the robberies with him, LaRue had already identified defendant as a suspect. The mere fact that David confirmed Detective LaRue's findings does not render all of LaRue's testimony hearsay. In addition, the trial court had the testimony of Kim Thieke to consider.