STATE OF MINNESOTA
IN COURT OF APPEALS
A07-2353

State of Minnesota,
Respondent,

vs.

Nancy Lynn Martinez,
Appellant.

Filed March 31, 2009
Affirmed
Shumaker, Judge

Lake County District Court
File No. 38-CR-06-490

Lori Swanson, Attorney General, Kelly O'Neill Moller, Assistant Attorney General, 445 Minnesota Street, Suite 1800, St. Paul, MN 55101-2134; and

Russell H. Conrow, Lake County Attorney, Lake County Courthouse, 601 Third Avenue, Two Harbors, MN 55616 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Sara L. Martin, Assistant Public Defender, Suite 300, 540 Fairview Avenue North, St. Paul, MN 55104 (for appellant)

Considered and decided by Shumaker, Presiding Judge; Stoneburner, Judge; and Collins, Judge.*

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

U N P U B L I S H E D O P I N I O N

SHUMAKER, Judge

On appeal from her convictions of burglary and theft, the appellant contends that the admission of an unavailable witness's prior testimony violated her confrontation rights as provided in *Crawford*; that the prosecutor committed misconduct; and that the district court erred in failing to give limiting and accomplice-testimony instructions. We affirm.

FACTS

J.N. locked the doors to her house in rural Lake County and went to lunch. Meanwhile, appellant Nancy Lynn Martinez, Lucas Valure, and Ephraim Burks drove in Martinez's car to J.N.'s house. Once there, Martinez and Valure got out of the car, and Burks moved from the back seat into the driver's seat.

Valure climbed through a window on the side of the house and then opened the door for Martinez, who went inside. Shortly afterward, Martinez and Valure ran out of the house and back to the car. Burks thought Valure was hiding something under his shirt. Burks became frightened and drove away with Valure in the back seat and Martinez in the front. Then Valure took a gun from underneath his shirt and put it into a bag in the back seat. After a few blocks, Martinez took over the driving and Burks got into the back seat.

As the three drove away, J.N. saw them. She recognized Martinez as a person who had once lived with her daughter. J.N. had previously heard that Martinez was

coming to town to rob her of guns and money, and, upon seeing Martinez, suspected that her home had been burglarized.

When J.N. arrived home, she noticed that a screen was off a window; the front door was open; and that her husband's gun, some of her jewelry, and a video camera were missing. She called 911 to report the burglary, and she indicated that she suspected the people she saw near her home driving away.

A deputy sheriff stopped Martinez's car, searched it, and found the stolen gun, jewelry, and video camera. The gun and some bullets were in a black vinyl bag, and the other items were in a duffle bag next to it. The deputy arrested all three people.

Once in custody, Martinez agreed to a police interview during which she stated that she and the others had driven from Duluth to commit the burglary of J.N.'s house. Describing herself as the mastermind of the crime, Martinez said she had planned the burglary and had told Valure of her plan. She stated that Valure entered through a window and let her in through the front door. Once inside, she said Valure took a gun and that she took a jewelry box and a camera. When the police pressed her for specific details of the thefts, she replied: "The specific details are that we took a gun. We took some jewelry. We then got into a car and attempted to drive away." She also acknowledged that the bags in the car belonged to her. The police thought she was covering for Burks, but she assured them, "I'm not dodging all the facts. We robbed a house. We took a gun. We took some jewelry."

All three were charged with burglary and theft. Valure pleaded guilty and testified at Burks' trial. Burks was acquitted. Martinez went to trial and was the sole witness to

testify in her defense. She testified that she had lied to the police to protect Burks and that it was Valure who planned and committed the burglary. She indicated that she thought they were all going swimming and that Valure wanted to borrow swim trunks from a friend. Coincidentally, the house where the friend lived was J.N.'s house. Martinez testified that she went inside the house but knew something was wrong because nobody was home. Valure, she said, told her to pick up a camcorder and some snacks. She denied going into the bedroom, where the gun was located, and she denied taking jewelry or ever seeing the gun either in the house or in her car. She stated that she became aware of the gun only after the police searched the car. She noted that Valure had admitted taking the gun and had pleaded guilty.

On rebuttal, over Martinez's objection, the prosecutor was allowed to read into evidence part of Valure's testimony from an earlier proceeding in which he stated that the burglary was Martinez's idea and that she led him directly to the bedroom of J.N.'s house and told him to take the gun they found there.

The jury found Martinez guilty of burglary and theft, and she appealed.

D E C I S I O N

Martinez's first claim on appeal is that the district court deprived her of her right of confrontation when it admitted Valure's prior statement into evidence. Under both the federal and state constitutions, an accused is guaranteed the right to confront witnesses who testify against him. U.S. Const. amend VI; Minn. Const. art. 1, § 6. "[W]e apply the same analysis under both Confrontation Clauses." *State v. Holliday*, 745 N.W.2d 556, 564 (Minn. 2008) (citation omitted). An alleged violation of the Confrontation Clause is

a question of law that we review de novo. *State v. Warsame*, 735 N.W.2d 684, 689 (Minn. 2007).

A testimonial statement by a witness who does not testify at the accused's trial is inadmissible unless the accused had a prior opportunity to cross-examine the witness. *Crawford v. Washington*, 541 U.S. 36, 68, 124 S. Ct. 1354, 1374 (2004); *Warsame*, 735 N.W.2d at 689.

The state called Valure, who had already pleaded guilty, to testify at Martinez's trial. When the prosecutor asked the first question, Valure responded, "I plead the fifth." Outside the presence of the jury, the court informed Valure that he had no Fifth Amendment privilege and that he could be sanctioned for his refusal to testify. Valure persisted in his refusal. Later in his case-in-chief, the prosecutor called Valure a second time—the propriety of which is discussed below—and Valure remained steadfast in his refusal to testify.

After Martinez testified, retracting her confession to the police, the prosecutor offered into evidence Valure's testimony from Burks' trial. The court overruled Martinez's objection to that testimony and allowed it to be read to the jury.

It is not disputed that Valure's prior testimony was testimonial and thus within the purview of *Crawford*. *See Crawford*, 541 U.S. at 51-52, 124 S. Ct. at 1364 (noting that testimonial statements include prior testimony at a previous trial). Furthermore, because Valure absolutely refused to testify to anything, he effectively foreclosed Martinez's opportunity to cross-examine him. *State v. Ford*, 539 N.W.2d 214, 227 (Minn. 1995) (declaring that witness unavailability may be established by witness invoking Fifth

Amendment protection against self-incrimination); *see also State v. Durante*, 406 N.W.2d 80, 84 (Minn. App. 1987) ("Witnesses who invoke their Fifth Amendment privilege are unavailable for purposes of the confrontation clause."). Although a defendant is not guaranteed the right of successful cross-examination, a meaningful opportunity to ask questions is inherent in the protection of the Confrontation Clause. *United States v. Owens*, 484 U.S. 554, 560, 108 S. Ct. 838, 843 (1988).

As Martinez acknowledges, prosecutors may introduce non-testifying codefendants' statements for rebuttal purposes. *Tennessee v. Street*, 471 U.S. 409, 417, 105 S. Ct. 2078, 2083 (1985). The state here argues, among other things, that Valure's statement was offered to rebut Martinez's testimony and to impeach her by contradiction.

During his cross-examination, the prosecutor asked Martinez about "taking the blame" for the crime and about her confession to the police:

> Q. But you . . .
>
> A. . . . didn't take the gun. Luke [Valure] admitted to taking the gun. He pled guilty to taking the gun. Darell [Burks] even testified yesterday that Lucas, in fact, took the gun. He hid the gun. I never took the gun. I never saw the gun.
>
> Did I know something was wrong? Yeah. Did I lie to the police? Yes.

Martinez then explained that she lied to the police to cover for Burks because he was in college:

> Darell [Burks] still had nothing to do with it. Lucas [Valure] did. I didn't intentionally say that day, "Oh, nope, it was all Lucas." Today, yes, I'm . . . I'm gonna say it was all Lucas.

> And it was. And Lucas agrees. He pled guilty. He said he took the gun. He . . . this was all him.

The court then inquired as to whether Valure's statement was going to be offered for impeachment:

> THE COURT: I'm hearing [the prosecutor] saying that she opens the door, and this really is impeachment at this point; that Mr. Valure did not accept full responsibility as . . . that's the way I remember Mr. Valure's testimony; that Mr. Valure did accept some responsibility, but also attributed some of the blame to Ms. Martinez.
>
> Uh, are you talking impeachment? Am I gettin' that right or hearin' that right?
>
> PROSECUTOR: Yeah.

Testimonial statements of unavailable witnesses as to whom there has been no opportunity of cross-examination do not violate *Crawford* if they are used only for impeachment. *See State v. Ruggiero*, 120 P.3d 690, 694 (Ariz. Ct. App. 2005), *review denied* (Apr. 6, 2006) (holding that statements provided solely for impeachment purposes do not violate Confrontation Clause). Valure's prior testimony, which contradicted Martinez's testimony, was admissible for impeachment, and the district court did not err in so ruling. Martinez claimed that Valure had admitted full responsibility for the crime, that she was unaware of any criminal activity until the arrest, and that she made inculpatory statements only to cover for Burks. But Valure had testified otherwise, admitting that he had a role in the crime but stating that it was planned and directed by Martinez. His statement was proper impeachment.

Martinez also contends that, having ruled the Valure testimony admissible for impeachment, the court failed to give a proper limiting instruction to the jury. The court gave this instruction just before the Valure testimony was read: "Now, when we receive evidence in this form, it's important to understand that this is neither better nor lesser evidence. It's just another way of receiving evidence . . . this is not more important, not less important, it's just another way of receiving evidence." Martinez did not object to this instruction or request a different instruction.

Because Martinez failed to object to the court's instruction or to request an alternative instruction, we review her claim for plain error. We must determine whether there was an error, which was "plain," and that affected Martinez's substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). To show "plain" error, it must be demonstrated that the error was clear or obvious. *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). Martinez has cited no authority in support of her claim. *See Ganguli v. Univ. of Minn.*, 512 N.W.2d 918, 919 n.1 (Minn. App. 1994) (noting that this court need not address issues unsupported by legal analysis or citation). And the applicable rule is Minn. R. Evid. 105, which provides: "When evidence which is admissible . . . for one purpose but not admissible . . . for another purpose is admitted, the court, *upon request*, shall restrict the evidence to its proper scope and instruct the jury accordingly." (Emphasis added.) Because the rule requires a limiting instruction only upon a party's request, we cannot conclude that the court's failure to instruct the jury as to the limited purpose of the Valure testimony was "plain" error. Thus, Martinez's claim fails.

Nevertheless, when the court decides to give an instruction as to particular evidence, it should ensure that the instruction is adequate to address that evidence. Here, the court focused only on the form of the evidence, namely questions and answers, and did not mention its purpose. Because the court chose to give an instruction as to the evidence, it was advisable to make that instruction complete by encompassing both the form and purpose of the evidence. *See State v. Moua*, 678 N.W.2d 29, 37-39 (Minn. 2004) (stating that although an impeachment instruction is not required, such an instruction can be helpful).

Finally, as to this issue, Martinez contends that the state, in its final argument, relied on the Valure testimony as substantive evidence. The state did refer to the content of the Valure testimony but referred to it as "rebuttal" evidence: "Lucas Valure is offered in rebuttal to show that she is inconsistent in her statement. That her statements don't add up." The jury knew of Martinez's confession to the police and of her retraction of that confession during her trial testimony. It is just as likely that the jury considered the Valure testimony to resolve the conflict between Martinez's statements, namely as impeachment, as it did for any substantive purpose.

Martinez next asserts that the prosecutor engaged in misconduct by calling Valure a second time to testify after Valure had previously refused to testify. Martinez did not object, and thus we review this claim for plain error. *Ramey*, 721 N.W.2d at 298-99. If there was plain error, the state then has the burden of demonstrating that the error did not affect the defendant's substantial rights. *Id.*

It is improper for the state to call a witness at trial in *bad faith* just for the purpose of having that witness invoke a Fifth Amendment privilege not to testify. *State v. Mitchell*, 268 Minn. 513, 515, 130 N.W.2d 128, 130 (1964), *cert. denied*, 380 U.S. 984 (1965). Although Valure had stated outside the hearing of the jury that he would not testify, the record shows that the prosecutor had subsequent discussions with Valure and believed that Valure would in fact testify. Although the discussion between the prosecutor and Valure is not in the record, the prosecutor's contention is plausible. Valure initially claimed a Fifth Amendment privilege. The court clearly informed him that he had no privilege not to testify and that his refusal to testify could result in sanctions. It was after that admonition and further discussions with Valure that the prosecutor re-called Valure. We are unable to conclude that the prosecutor called Valure to testify knowing that he would again assert a privilege that he did not possess. *See State v. Lupino*, 268 Minn. 344, 359-60, 129 N.W.2d 294, 304-05 (1964) (no error if prosecutor did not know witness would invoke privilege), *cert. denied*, 379 U.S. 978 (1965). No plain error occurred. We note, however, that had the court actually used its contempt power when Valure refused to testify, all issues respecting the Valure testimony might have been obviated at both the trial and the appellate levels.

Finally, Martinez contends that the district court erred by failing sua sponte to give an accomplice-testimony instruction. She did not request such an instruction. "An accomplice instruction must be given in any criminal case in which any witness against the defendant might reasonably be considered an accomplice to the crime." *State v. Lee*, 683 N.W.2d 309, 316 (Minn. 2004) (quotation omitted) (holding that the district court

has a duty to instruct on accomplice testimony regardless of whether counsel for the defendant requests it, and the omission of the instruction is error.)

Although the court's failure to give an accomplice instruction when warranted is error, we conclude that such an instruction was not warranted here. Valure's testimony was admitted for impeachment and not to show that Martinez committed the crimes for which she was on trial. *State v. Ortlepp*, 363 N.W.2d 39, 45 (Minn. 1985) (finding an accomplice instruction is unnecessary where prior statement of witness was admitted only for impeachment purposes). In other words, the inference that the state intended the jury to draw from the Valure testimony was that Martinez's confession was true and her later retraction, which contained the inaccurate claim that Valure admitted that he was the sole knowing perpetrator, was false.

Even if it was error for the court to fail to give an accomplice-testimony instruction, the error was harmless. If accomplice testimony is corroborated by significant evidence, the failure to give the instruction is harmless error. *State v. Jackson*, 746 N.W.2d 894, 899 (Minn. 2008). The facts that corroborate Valure's testimony that Martinez planned the burglary and participated in it and in the theft are her confession to police; her admission that "we took the gun"; the fact that her car was used and that she drove it to J.N.'s house; the fact that she, and only she, had a prior negative relationship with J.N.'s daughter and, therefore, arguably a motive to commit the crime; and the fact that the fruits of the crime were found in Martinez's car and in containers that belonged to her.

Affirmed.