STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1210

State of Minnesota,
Respondent,

vs.

Craig Steven Fleming,
Appellant.

Filed June 30, 2009
Affirmed
Shumaker, Judge

Chisago County District Court
File No. 13-CR-06-1731

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

Janet Reiter, Chisago County Attorney, Jessica L. Stott, Assistant County Attorney, Chisago County Courthouse, 313 North Main Street, Center City, MN 55102 (for respondent)

Gregory J. Rebeau, 2000 Benson Avenue, St. Paul, MN 55106 (for appellant)

Considered and decided by Toussaint, Chief Judge; Shumaker, Judge; and Halbrooks, Judge.

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

SHUMAKER, Judge

On appeal from his conviction of second-degree intentional murder, appellant challenges the district court's decision to admit a witness's grand-jury testimony into evidence. Because the evidence was admissible as both substantive and impeachment evidence and the appellant's confrontation-clause rights were not violated, we conclude that the district court did not abuse its discretion in admitting the evidence, and affirm.

FACTS

Appellant Craig Steven Fleming was convicted for the murder of M.C. On the evening of the murder, July 21, 2006, Fleming and his girlfriend, L.L., were out drinking at a bar, as were M.C. and two others, J.S. and T.M. Later that evening, Fleming and L.L. went to T.M.'s home where they sat with T.M., J.S., and M.C. in the living room. M.C. was angry at Fleming for coming to T.M.'s home, and the two began to argue. After a few minutes, Fleming stood up and shot M.C. in the forehead. M.C. died as a result of the gunshot wound.

J.S. called the police. Fleming was arrested at his sister's home at approximately 2 a.m. on July 22, 2006. He directed police to the murder weapon, a Ruger .45 caliber semi-automatic gun, in the center console of his pickup truck.

L.L. appeared at the state's grand jury proceeding in August, 2006. She testified that, on the night of the murder, she had thought that Fleming was driving her home from the bar, but that he unexpectedly went to T.M.'s house instead. She explained that Fleming and M.C. began to argue, and she testified that she saw Fleming pull out a gun.

She ran toward a door and, as she fled, she heard a gunshot and turned back to see "a hole in [M.C.]'s head; within one second I saw that, and was out the door." Fleming was indicted for murder in the first and second degrees and for two counts of second-degree assault.

Jury trial began on February 11, 2008. After the state rested its case, Fleming called L.L. to testify as a defense-witness. Contrary to her testimony before the grand jury, L.L. testified that Fleming went to T.M.'s residence after they left the bar because they were invited there. She also related several details that she had not mentioned in her grand jury testimony, and she ultimately offered her opinion that T.M., J.S. and M.C. were going to kill Fleming, and that Fleming could not have avoided the situation.

On cross-examination, L.L. denied seeing Fleming pull a gun out of his waistband and stated she did not remember testifying to that effect before the grand jury. The prosecutor asked the court to "take judicial notice" of L.L.'s grand jury testimony, and offered the transcript of her testimony as an exhibit. Defense counsel objected on the grounds that admission of the transcript violated Fleming's rights under the confrontation clause. The court overruled the objection and admitted the transcript as evidence. Fleming did not request a cautionary instruction as to the use of the transcript, but before closing arguments, the court instructed the jury that "[e]vidence of any prior inconsistent statement or conduct should be considered only to test the believability and weight of the witness's testimony." The jury was permitted to take the transcript into the deliberation room, and Fleming did not object.

The jury found Fleming guilty of intentional second-degree murder. He appeals from this conviction, arguing that the district court abused its discretion by admitting L.L.'s grand jury testimony into evidence and that the prejudice resulting from this error warrants a new trial.

D E C I S I O N

Fleming argues that the district court abused its discretion by allowing L.L.'s grand jury testimony into evidence. Respondent state maintains that L.L.'s prior inconsistent statements were admissible as either substantive or impeachment evidence. The district court has considerable discretion in admitting evidence, and we review an evidentiary ruling for abuse of that discretion. *State v. Martinez*, 725 N.W.2d 733, 737 (Minn. 2007). "On appeal, the appellant has the burden of establishing that the [district] court abused its discretion and that appellant was thereby prejudiced." *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003). We hold that the district court did not abuse its discretion when it admitted the transcript containing L.L.'s prior testimony. L.L.'s prior inconsistent statements were admissible as both substantive evidence under Minn. R. Evid. 801(d)(1)(A) and as impeachment evidence, and their admission did not violate Fleming's right to confront the witnesses against him.

A prior inconsistent statement is not hearsay if "[t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition[.]" Minn. R. Evid. 801(d)(1)(A). If the circumstances described in rule

801(d)(1)(A) are satisfied, the statement may be admitted as substantive evidence. *State v. Thames*, 599 N.W.2d 122, 125 (Minn. 1999).

L.L.'s prior testimony met the conditions of 801(d)(1)(A). It was given under oath at a previous proceeding before the grand jury, and she was available for questioning by the defense concerning her previous statements. *See State v. Moua*, 678 N.W.2d 29, 37 n.8, 38 n.9 (Minn. 2004) (noting that grand jury testimony was admissible for substantive purposes under Minn. R. Evid. 801(d)(1)(A)). Fleming does not argue that L.L.'s trial-testimony was not sufficiently inconsistent so as to fall under the rule's purview, and therefore we need not address that issue. Suffice it to say that L.L.'s testimony before the grand jury differed substantially in theme and substance from that which she offered at trial. Generally, inconsistency "is to be determined, not by individual words or phrases alone, but by the *whole impression or effect* of what has been said or done." *O'Neill v. Minneapolis St. Ry. Co.*, 213 Minn. 514, 520, 7 N.W.2d 665, 669 (1942) (quotation omitted); *see also Hunt v. Regents of Univ. of Minn.*, 460 N.W.2d 28, 34 (Minn. 1990) (directing that inconsistency be "determined from the full testimony, not isolated portions"). The theme of L.L.'s testimony at trial was that Fleming shot M.C. in self-defense, while her testimony before the grand jury portrayed a picture of Fleming standing over M.C. pointing a gun at his head. The court did not abuse its discretion in admitting the evidence of her prior inconsistent statements as substantive evidence.

The transcript of L.L.'s testimony was also admissible as impeachment evidence. Evidence of a witness's prior inconsistent statements may be admissible to impeach a witness's testimony at trial. *State v. McDonough*, 631 N.W.2d 373, 388 (Minn. 2001).

Impeachment evidence consisting of an out-of-court statement is not inadmissible hearsay because it is not offered to prove the truth of the matter asserted. *See* Minn. R. Evid. 801(c) (defining hearsay statements as those offered for their truth); *see also Moua*, 678 N.W.2d at 37 (explaining that evidence of prior inconsistent statements can be admissible for impeachment purposes). Such a statement is offered only to challenge the witness's veracity by showing the witness's self-contradiction. L.L.'s prior inconsistent testimony was admissible as impeachment evidence because it allowed the jury to assess L.L.'s veracity along with her ability to recall the pertinent events of that evening.

Fleming argues that even if L.L.'s prior testimony was appropriately used for impeachment purposes, the court failed to contemporaneously instruct the jury as to the appropriate use of L.L.'s prior inconsistent testimony. While a contemporaneous cautionary instruction on impeachment evidence sometimes can be helpful to the jury, it is not required by law. *Moua*, 678 N.W.2d at 39. Fleming did not request such an instruction, and it "is not error to fail to give an unrequested cautionary instruction relating to the weight of certain testimony." *State v. Soltau*, 212 Minn. 20, 25, 2 N.W.2d 155, 158 (1942). Furthermore, because L.L.'s prior testimony was also substantive evidence, a limiting instruction would be neither necessary nor appropriate.

Fleming's principal objection to the introduction of L.L.'s grand jury testimony was that admission of L.L.'s prior testimony deprived him of his right to confront the witness against him. The court overruled his objection. "[W]hether the admission of evidence violates a criminal defendant's rights under the Confrontation Clause is a

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

Both the United States Constitution and the Minnesota Constitution afford an accused the right to confront witnesses who testify against him. U.S. Const. amend. VI; Minn. Const. art. 1, § 6. Thus, testimonial statements from declarants who do not appear at trial are inadmissible unless the declarant is "unavailable" for trial, and the defendant has had a prior opportunity to cross-examine that declarant. *Crawford v. Washington*, 541 U.S. 36, 68, 124 S. Ct. 1354, 1374 (2004); *Warsame*, 735 N.W.2d at 689. However, the "*Crawford* [decision] suggested that the Confrontation Clause is not even implicated when a declarant testifies at trial." *State v. Holliday*, 745 N.W.2d 556, 565 (Minn. 2008).

While it is undisputed that L.L.'s grand jury testimony was "testimonial" in nature, L.L. testified at Fleming's trial and was subject to examination about her previous statements. "[W]hen the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements." *Crawford*, 541 U.S. at 59 n.9, 124 S. Ct. at 1369 n.9, cited in *Holliday*, 745 N.W.2d at 565. Fleming was not precluded from confronting L.L. regarding her previous testimony when he himself called her to testify at his trial. In short, his rights under the confrontation clause were not violated.

Fleming makes additional arguments on appeal, the bases of which are not clear, and it does not appear from the record that any of these arguments were raised to the district court. It was not necessary, as Fleming appears to contend, that he have the opportunity to cross-examine L.L. at the time she testified before the grand jury, or that

the prosecution prove that she was "unavailable" before offering her prior testimony. Fleming seems to be confusing his situation with that provided for in rule 804(b)(1) of the Minnesota Rules of Evidence, which states that "former testimony" of an "unavailable witness" may be introduced in certain circumstances. But this provision is only applicable to witnesses who are "unavailable" to testify at trial. L.L. was present and willing to answer all of Fleming's questions. She was not unavailable and therefore rule 804(b)(1) has no application.

Finally, Fleming complains that permitting the jury to take the transcript into jury deliberations was highly prejudicial, yet he did not object at trial. Thus, we review this claim for plain error. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). The party asserting the error must show that there was (1) error; (2) that was plain; (3) that affected the party's substantial rights. *Id.* Fleming has not shown any error on the part of the district court.

Extrinsic evidence of a prior inconsistent statement is admissible if the declarant has an opportunity to address the inconsistency. Minn. R. Evid. 613(b); *see also State v. Caine*, 746 N.W.2d 339, 351 (Minn. 2008) (upholding admission of entire plea transcript of inconsistent testimony under Minn. R. Evid. 801(d)(1)(A)). L.L. had an opportunity to address her statements, therefore the transcript was admissible as an exhibit. "The court shall permit the jury . . . to take to the jury room exhibits which have been received in evidence[.]" Minn. R. Crim. P. 26.03, subd. 19(1). Although the rule contains the word "shall," the court must exercise caution and discretion in considering whether the material will aid the jury, whether the material will unduly prejudice a party, and whether

the jury might improperly use the material. *State v. Kraushaar*, 470 N.W.2d 509, 515 (Minn. 1991).

Thus, Fleming contends that the jury should not have been permitted to take the transcript of L.L.'s grand jury testimony into the deliberation room because it was prejudicial. He claims that L.L.'s testimony must be "deemed" prejudicial because L.L. was experiencing "medical [and] emotional difficulties" at the time she testified before the grand jury, and was not subject to cross-examination at that time. Unfair prejudice "is evidence that persuades by illegitimate means, giving one party an unfair advantage." *State v. Schulz*, 691 N.W.2d 474, 478 (Minn. 2005). Fleming fails to explain how L.L.'s circumstances would have had a prejudicial effect on the jury. Her difficulties in testifying were apparent from the transcript as well as from her live testimony, and Fleming had ample opportunity to question L.L. about these matters. Any prejudice arising from allowing the transcript to be taken into the jury deliberation room does not rise to the level of plain error.

The district court did not abuse its discretion in admitting evidence of L.L.'s prior inconsistent statements.

Affirmed.