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**STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1725**

State of Minnesota,
Respondent,

vs.

Gilbert Diaz Vargas,
Appellant.

**Filed September 7, 2010
Reversed and remanded
Shumaker, Judge**

Polk County District Court
File No. 60-CR-08-3141

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Gregory A. Widseth, Polk County Attorney, Crookston, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, David E. Axelson, Assistant Public
Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Klaphake, Presiding Judge; Shumaker, Judge; and
Schellhas, Judge.

UNPUBLISHED OPINION

SHUMAKER, Judge

Appellant contends that the prosecutor committed plain and prejudicial error
during a trial on the charge of first-degree burglary with assault, and other charges, by

eliciting evidence of the plea of guilty of appellant's accomplice and by repeatedly emphasizing that plea so as to invite the jury to infer appellant's guilt by association. We reverse and remand.

FACTS

We address two issues of merit in this appeal. The first is the propriety of the prosecutor's conduct in introducing into evidence at trial, and repeatedly emphasizing in final argument, the plea of guilty of appellant's accomplice to first-degree burglary, with which appellant was also charged. The second is the question of whether appellant's two gross-misdemeanor convictions of fifth-degree assault must be vacated because they are subsumed within the conviction of first-degree burglary with assault.

A jury found appellant Gilbert Dias Vargas guilty of aiding and abetting first-degree burglary with assault and fifth-degree assault (against V.R.). The jury also found Vargas guilty of another count of fifth-degree assault (against D.J.) and of interfering with an emergency telephone call.

All crimes stemmed from an incident at the apartment of V.R. and her boyfriend D.J. on October 28, 2008, around 11:00 p.m. Earlier in the day, V.R.'s brother broke the windshield of Jodi Day's car. Day then contacted members of V.R.'s family, whom she knew, to try to arrange for reimbursement for the damage.

Believing that one of V.R.'s relatives had agreed to pay for the damage and that V.R. and her family were at V.R.'s apartment, Day, Vargas, and Juan Cruz (Day's boyfriend) went to the apartment to collect the money.

V.R. and D.J. testified that they heard knocking at the door, that V.R. opened it to see who was there, and that Day, Vargas, and Cruz pushed against the door and forced their way into the apartment. At the apartment doorway, Day began to beat V.R., and the altercation spilled into the apartment. Vargas entered the apartment and started to punch D.J. When D.J. tried to use a cell phone, Vargas told him that he was not going to call the police, and he threw the phone out of D.J.'s reach. D.J. managed to get out of the apartment, and eventually Day, Vargas, and Cruz left as well.

V.R. and D.J. testified that they never invited Day, Vargas, or Cruz into the apartment. Both V.R. and D.J. suffered injuries in the incident.

The prosecutor called Day as a witness during his case-in-chief. Day admitted fighting with V.R. inside the apartment. The prosecutor then inquired as to whether Day had pleaded guilty to first-degree burglary as a result of the incident:

Q. And you were also charged on that fight, is that correct?

A. Yes.

Q. You recently plead[ed] guilty to Burglary in the First Degree, is that correct?

A. Yes, I did.

Q. Specifically, you plead[ed]—what you plead[ed] guilty to was on or about October 28th, 2008, that you and Mr. Vargas had entered [D.J.'s] residence without consent and while a person not an accomplice was present in the residence therein, and you and Gilbert Vargas assaulted [V.R.] and [D.J.] in East Grand Forks, is that right?

A. I took the Alford plea, yes, to burglary.

Q. You plead[ed] to that offense, is that correct?

A. Um-hum (meaning yes).

Q. And you were just sentenced for that on Monday, is that correct?

A. Yeah.

Although there was no explanation by anyone of what an *Alford* plea is, defense counsel elicited on cross-examination that Day pleaded guilty because she thought the jury would find her guilty and she did not want to go to prison. No evidence of a plea agreement of any sort was presented, nor did defense counsel object to Day's testimony about her plea of guilty.

On redirect examination, the prosecutor inquired about Day's and Vargas's entry into the apartment:

Q. Ms. Day, you were never invited into the apartment, were you?

A. No.

Q. And Mr. Vargas was never invited into the apartment, was he?

A. No.

During his final argument and rebuttal argument, the prosecutor referred several times to Day's plea of guilty, all without objection by Vargas.

After the jury found Vargas guilty of all charges, the district court entered judgments of conviction and sentenced him on the burglary conviction and the two assault convictions.

Claiming that the prosecutor committed misconduct in introducing evidence of and arguing Day's plea of guilty, and contending that the assault convictions are subsumed by the burglary conviction, Vargas brought this appeal.

DECISION

Prosecutorial Misconduct

Vargas contends that, by introducing Day's plea of guilty and then repeatedly referring to that plea in final argument and rebuttal argument, the prosecutor invited an improper inference of guilt by association, and that such prosecutorial misconduct compels reversal.

Because Vargas failed to object to this evidence or to the arguments, we review his contentions under a "modified plain error test." *See State v. Wren*, 738 N.W.2d 378, 389 (Minn. 2007). Under this test, Vargas must show that the misconduct was plain error. *See id.* at 393. If he shows that, the burden shifts to the state to demonstrate that the misconduct did not prejudice Vargas's substantial rights. *See State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). If the modified plain-error test is satisfied, this court is to "assess whether it should address the error to ensure fairness and the integrity of the judicial proceedings." *Id.* at 298 (quotation omitted).

Day indisputably was charged as an accomplice of Vargas. The complaint charges that Day and Vargas, "each while intentionally aiding, advising, hiring, counselling, or conspiring with . . . [or] otherwise procuring the other to commit a crime, did feloniously and unlawfully enter a building without consent, with intent to commit a crime, and assaulted a person within the building" The complaint also charges Day and Vargas with aiding and abetting each other in assaulting V.R. Furthermore, the prosecutor characterized Day in his opening statement as Vargas's accomplice.

The clear general rule is that “evidence of a plea of guilty, conviction or acquittal of an accomplice of the accused is not admissible to prove the guilt or lack of guilt of the accused.” *State v. Cermak*, 365 N.W.2d 243, 247 (Minn. 1985). There is a risk of prejudice from evidence of an accomplice’s plea of guilty because a jury might infer an accused’s guilt by his association with an accomplice who has already pleaded guilty to the crime with which the accused is charged. *See Skilling v. United States*, 130 S. Ct. 2896, 2917 (2010) (noting that codefendant’s “well-publicized decision to plead guilty” created a danger of juror prejudice); *id.* at 2952 (Sotomayor, J., concurring in part and dissenting in part) (observing that codefendant’s plea of guilty suggested guilt by association).

But there are exceptions to the general rule. If an accomplice is not available to testify, evidence of the accomplice’s plea of guilty may be allowed to provide an “account of events leading up to and after the crime . . . for the value of the first-hand narrative of what happened.” *State v. Caine*, 746 N.W.2d 339, 351 (Minn. 2008) (quotation omitted). This exception does not apply here because Day testified. A co-defendant’s plea of guilty may also be allowed to rebut an anticipated theory of defense. *Cermak*, 365 N.W.2d at 247. This exception does not appear to fit the case. The state argues other possible exceptions, contending that an accomplice’s plea may be admitted as evidence of bias under Minn. R. Evid. 616, or for the purpose of impeachment under Minn. R. Evid. 609(a). The state also urges that Day’s plea was admissible to explain the basis for her firsthand knowledge of the incident.

The ostensible rule 616 and rule 609(a) bases are not plausible here because the prosecutor did not call Day as his witness to impeach her or to demonstrate her bias in favor of Vargas and against the state. Rather, he elicited from her, through the evidence of her plea of guilty, the essential elements of entry into a building without the possessor's consent and the commission of an assault inside the building. He also obtained from her an admission that neither she nor Vargas was invited into the apartment. It is clear that the prosecutor used the accomplice's testimony to bolster his case against the accused.

Nor are we persuaded that the prosecutor introduced Day's plea of guilty to explain the basis for her firsthand knowledge of the incident. Simply showing that she was present and witnessed, or even participated in, the altercation would have established the basis of her firsthand knowledge.

Although the exceptions noted above, and others, can provide legitimate reasons for the admission of an accomplice's plea of guilty, none apply here. Rather, the true purpose of the evidence can be discerned from the emphasis the prosecutor gave to it during his final argument and rebuttal argument. He discussed the concept of aiding and abetting:

Here, you have to remember that *Jodi Day plead[ed] guilty to Burglary in the First Degree*. She got up and she told you that yesterday, relating to this incident. So, when you look at the aiding thing here, [Vargas] is guilty of the burglary and assault if he committed the offenses himself or if he aided or conspired with Jodi Day to commit those offenses.

(Emphasis added.) Although it surely is proper for the state to show, and to argue, all the facts and circumstances to support the charge of aiding and abetting a crime, the use of an accomplice's plea of guilty to do so can be perilous.

The prosecutor continued with his references to Day's plea:

We [know V.R.] was assaulted by Jodi Day. [V.R.] testified to that fact. [D.J.] testified to that fact. . . . And Jodi Day didn't deny when she got up and testified that she assaulted [V.R.]. In fact, *Jodi Day told you that she plead[ed] guilty to Burglary in the First Degree involving the assault of [V.R.]*.

(Emphasis added.)

The prosecutor next emphasized the connection between Day and Vargas, stating: "The second thing to look at in this aiding offense, did [Vargas] aid Jodi Day? *He had a close association to Jodi Day, who has plead[ed] guilty to committing Burglary in the First Degree.*" (Emphasis added.)

In further exploring the nature of aiding and abetting, the prosecutor continued to refer to Day's plea:

[Y]ou can't [find] someone guilty of aiding unless the underlying crime was committed by someone. Here, we know the underlying crime was committed by someone because *that person plead[ed] guilty to it.*

. . . .

. . . [Vargas] is guilty of a crime only if the other person here Jodi Day, committed a crime. And here, *you know, that she did because she plead[ed] guilty to it.*

(Emphasis added.)

The prosecutor reiterated the evidence of the assault on V.R. and noted how Vargas aided Day in that assault:

And we also know that [V.R.] was assaulted by Jodi Day. *Jodi Day plead[ed] guilty to Burglary in the First Degree, which included the assault of [V.R.].*

. . . .

. . . Mr. Vargas's conduct in going over to the apartment here, clearly aided Ms. Day in committing this offense. And, again, *don't forget that Ms. Day plead[ed] guilty to this offense.*

(Emphasis added.)

In his rebuttal argument, the prosecutor properly noted that Day's plea did not necessarily mean that Vargas was also guilty: "First of all, Jodi Day's guilty plea, I'm not here telling you that because she plead[ed] guilty that means that you find him guilty." But then he virtually negated that proper comment as he discussed his point further:

So, again, I'm not saying because *she plead[ed] guilty*, he has to be guilty. What I'm saying is *that's one of the factors that you have to consider . . .* in determining, "Well, was there permission to enter the residence?" You can also use that factor to determine, "Well, was [V.R.] actually assaulted within the residence?"

(Emphasis added.)

Here, the prosecutor clearly invited the jury to consider the accomplice's plea of guilty—rather than just the facts of the accomplice's involvement—in deciding two essential elements of the burglary charge. Day's plea of guilty permeated the prosecutor's arguments and became a central focus in those arguments. Having failed to show a legitimate purpose for the introduction of and repeated references to the

accomplice's plea of guilty, the prosecutor was bound by the clear general rule of inadmissibility. His failure to follow the rule was prosecutorial misconduct and plain error.

Because the prosecutorial misconduct here amounted to plain error, the state has the burden of demonstrating that the error did not affect Vargas's substantial rights. *See Ramey*, 721 N.W.2d at 300. The state acknowledges that "[a]dmittedly, there is a risk whenever a testifying witness' guilty plea is introduced at trial that the jury may consider it to be substantive evidence of the defendant's guilt." But then the state argues that no such prejudicial use likely occurred here because the district court instructed the jury that it could consider a witness's conviction only for determining the witness's credibility; and that "the evidence supporting [Vargas's] guilt is overwhelming."

Although the district court did give the "credibility" instruction, we find the state's argument on this point disingenuous. The prosecutor called Day as his witness and elicited from her evidence that helped establish the essential elements of his case. He never impeached her, nor did he argue to the jury that she was not worthy of belief. Rather, he repeatedly noted that she admitted the crime, urging the jury to believe her rather than to disbelieve her.

The state also argues that there was no prejudicial effect of the error because "the evidence supporting [Vargas's] guilt is overwhelming." The state points to the testimony of V.R. and D.J. that Vargas and the others entered the apartment without consent and that Day and Vargas assaulted them inside the apartment. Vargas argues that permission

to enter the apartment “would be implicit from [V.R.’s and Day’s] history together and because of the day’s earlier events.”

It was essential to prove beyond a reasonable doubt Vargas’s entry into the apartment without consent. He entered with Day. Although Day and V.R. had not seen each other for a while, they had known each other for some time. Day was V.R.’s sister’s roommate and V.R. was Day’s son’s aunt. Day was acquainted with V.R.’s family members. Day’s son had been at V.R.’s apartment earlier that day, and his mother had gone there to pick him up. When V.R. realized that Day was at the door just before the altercation started, she had no immediate reason to suppose the visit would be hostile. V.R. testified:

- Q. So, when Ms. Day got there, did you have an idea why she was there?
- A. No, I was kind of confused on why she was there because I hadn’t talked to her for a long time, just, “What are you doing here?” I knew she was up to something because she came over with him and I don’t even know him.

But for Day’s plea of guilty, which contained an express acknowledgment of entry without consent, the evidence of Day’s relationship with V.R. and V.R.’s lack of immediate knowledge that Day would become combative, supports an inference that V.R. consented to the entry. Without evidence of Day’s plea of guilty, the jury might have been persuaded that there was a reasonable doubt as to the element of non-consensual entry, even though the evidence of the assaults inside the apartment was strong. Day’s plea made it highly unlikely that the jury could be persuaded that Vargas, who had no prior relationship with V.R., entered the apartment with consent.

The implication of guilt by association compromised the integrity of the trial and constituted reversible plain error.

Fifth-Degree Assault Convictions

Even though our holding on the issue of prosecutorial misconduct is dispositive of the appeal, for the district court's guidance we will briefly address the question of whether fifth-degree assault is subsumed within first-degree burglary with assault.

The state charged Vargas with first-degree burglary with assault under Minn. Stat. § 609.582, subd. 1(c) (2008), alleging that he entered a building without consent and assaulted “[V.R.] and/or [D.J.]” The state also charged Vargas with separate fifth-degree assaults against V.R. and D.J. Minnesota law provides that an accused may be convicted of a charged crime or of an included crime but not of both. Minn. Stat. § 609.04, subd. 1 (2008). An included crime is a “crime necessarily proved if the crime charged were proved.” *Id.*, subd. 1(4). There is a general exception to this rule for burglary: “[A] . . . conviction of the crime of burglary is not a bar to conviction of or punishment for any other crime committed on entering or while in the building entered.” Minn. Stat. § 609.585 (2008). The question is whether “any other crime” includes an assault that is not separate from the burglary but rather is an essential element of that crime.

The Minnesota Supreme Court recently considered the question in the context of third-degree assault. *State v. Holmes*, 778 N.W.2d 336, 340 (Minn. 2010). The supreme court held that an accused may be convicted of both first-degree burglary with assault and third-degree assault because the latter crime requires proof of substantial bodily harm, an element not required for proof of burglary with assault:

We read [Minn. Stat. § 609.585] to allow a conviction of another crime committed in the same course of conduct as the burglary, provided that the statutory elements of that crime are different than the crime of burglary. The phrase “any other crime” means a crime that requires proof of different statutory elements than the crime of burglary.

Id. at 341.

The fifth-degree assault charges here, as gross misdemeanors, require proof of a prior qualifying conviction as an essential element of each assault charge. Arguably then, under *Holmes*, Vargas could be convicted of burglary and the gross-misdemeanor assaults. But because it is not essential for us to determine this issue, we will leave further analysis and resolution to the district court on remand.

Finally, we need not address Vargas’s additional arguments that the district court erred in failing to give an accomplice jury instruction and that the prosecutor’s assertion that V.R.’s testimony alone could support a conviction was a misstatement of the law. We find no merit in either argument.

Reversed and remanded.