STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1228

State of Minnesota,
Respondent,

vs.

Matthew William Dumais,
Appellant.

Filed June 20, 2011
Affirmed
Connolly, Judge

Olmsted County District Court
File No. 55-CR-07-5809

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

Mark A. Ostrem, Olmsted County Attorney, Rochester, Minnesota; and

Eric M. Woodford, Criminal Division Lead Attorney, Staci J. Amundson (certified student attorney), Rochester, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Roy G. Spurbeck, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Toussaint, Presiding Judge; Klaphake, Judge; and Connolly, Judge.

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

CONNOLLY, Judge

Appellant argues that he is entitled to a new trial because the prosecutor relied on evidence of appellant's accomplice's guilty plea to prove appellant's guilt. Because the state has shown there is no reasonable possibility that, if the jury had not heard evidence of appellant's accomplice's guilty plea, it would have found appellant was not guilty, we affirm.

FACTS

During the night of November 13-14, 2006, some copper wire was removed from a construction site. An investigation led police to appellant Matthew Dumais and his brother, Jason Dumais, who were charged with aiding and abetting each other in receiving stolen property valued at over $500. Jason Dumais pleaded guilty.

At appellant's trial, the prosecutor told the jury in his opening statement that the investigating officer "spoke to Jason Dumais, who was also charged in this case. You will hear that he pled guilty. He was charged with aiding and abetting his brother [appellant] in selling this stolen copper. Pled to it. Was convicted." Jason Dumais's guilty-plea transcript was admitted as an exhibit at appellant's trial. In the transcript, he answers affirmatively when asked if he and appellant sold some scrap copper, if he had since learned that the copper was stolen; if the copper would be considered a high-grade copper; if they sold "a fair amount" of copper; if he and his brother split the money they received from the sale, and if he should have realized that the copper was stolen.

Jason Dumais was questioned on his guilty-plea transcript during appellant's trial.

> PROSECUTOR: I want to ask you specifically about . . . [t]his incident of the sale of the copper . . . . Do you recall that?
> JASON DUMAIS: Somewhat, yes.
> PROSECUTOR: Now, you were also charged in this case with receiving stolen property along with your brother; is that right?
> JASON DUMAIS: That's correct.
> PROSECUTOR: And you have pled guilty to that charge; is that right? Maybe a year ago or so?
> JASON DUMAIS: I can't answer that yes or no.
> . . . .
> PROSECUTOR: What did you plead to?
> JASON DUMAIS: Aiding and abetting receiving stolen property.
> PROSECUTOR: Okay. Aiding and abetting [appellant], your brother, correct?
> JASON DUMAIS: I believe so.
> PROSECUTOR: He was the one charged along with you.
> JASON DUMAIS: Yes.
> PROSECUTOR: Okay. . . . Why did you plead guilty?
> JASON DUMAIS: . . . It was cheaper to pay the restitution than it was to try to hire an attorney.

Jason Dumais also testified that he and appellant had sold high-grade copper wire for about $496 and split the money. In closing argument, the prosecutor said, "Jason Dumais stands convicted of aiding and abetting his brother in receiving stolen property, all this [copper] cable."

Appellant argues that the prosecutor impermissibly relied on evidence of Jason Dumais's guilty plea to prove appellant's guilt and that appellant is therefore entitled to a new trial.

D E C I S I O N

The parties agree that no objection was made to Jason Dumais's testimony during appellant's trial. When a prosecutor's misconduct is not objected to, the standard of review is a modified plain-error test in which "the nonobjecting defendant [must] demonstrate both that error occurred and that the error was plain" and "the state . . . [must] show that there is no reasonable likelihood that the absence of the misconduct in question would have had a significant effect on the verdict of the jury." *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006) (quotation omitted).

"[G]enerally 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) (concluding, however, that admission of evidence that three co-defendants "had been investigated, charged, convicted . . . and sentenced on similar charges" was admissible in defendant's trial). Admission of an accomplice's plea transcript is permissible if it is admitted to provide a "first hand narrative" of what happened rather than to prove the accomplice's guilt. *State v. Dukes*, 544 N.W.2d 13, 18 (Minn. 1996) (noting that, although in *Cermak* the plea transcript was admitted to prove the accomplice's guilt, *Cermak* "does not express an absolute bar to admission").

Appellant attempts to distinguish *Dukes*, arguing that the prosecutor here focused only "on the . . . bare plea, and not on the narrative accompanying the plea." But Jason Dumais's plea transcript provided a "first-hand narrative" of the essentials of what happened: he and appellant had sold a fair amount of a high grade of copper that he

should have known was stolen, and they shared the proceeds. Like the accomplice's plea-hearing testimony in *Dukes*, Jason Dumais's plea-hearing testimony gave the jury first-hand information about the relevant events.

Jason Dumais's plea testimony was also used to impeach some of his testimony during appellant's trial. A prior inconsistent statement given under oath is admissible if the witness is present at trial and subject to cross-examination concerning the prior statement. Minn. R. Evid. 801(d)(1)(A); *see also State v. Caine*, 746 N.W.2d 339, 350-51 (Minn. 2008) (guilty-plea transcript of co-defendant who feigned memory loss during a trial found admissible under Minn. R. Evid. 801(d)(1)(A)). During appellant's trial, Jason Dumais feigned memory loss about the incident and provided testimony that conflicted with testimony from his guilty-plea hearing. Testimony from his guilty-plea hearing thus impeached some of his testimony at appellant's trial.

Appellant relies on *State v. Dillon*, 529 N.W.2d 387, 391 (Minn. App. 1995) (*Dillon I*), which concluded that the admission of evidence of an accomplice's guilty plea was an abuse of discretion because "it [was] not probative of the accused's guilt and [could] give rise to the prejudicial inference that, because the accomplice is guilty, so is the accused." But, despite the abuse of discretion, *Dillon I* declined to reverse the accused's convictions because it "conclude[d] there [was] overwhelming evidence to support convictions on all counts." *Dillon I*, 529 N.W.2d at 394. *Dillon I* also held that the "determination [of whether there was a reasonable possibility that erroneously admitted evidence contributed to the jury's guilty verdict] was dependent upon the sufficiency of the evidence presented at trial" *Id.* at 393.

State v. Dillon, 532 N.W.2d 558, 558-59 (Minn. 1995) (*Dillon II*) reviewed *Dillon I* and remanded because the correct standard was "how strong the evidence was, not whether it was 'sufficient.'" On remand, *State v. Dillon*, No. C3-94-1248, 1995 WL 507622 *3 (Minn. App. Aug. 29, 1995) (*Dillon III*) *review denied* (Minn. Oct. 18, 1995) concluded that "[t]here is no reasonable possibility that a reasonable jury might have reached a different result had [the accomplice's] guilty plea not been introduced" and affirmed the conviction. Thus, the import of *Dillon I*, *Dillon II*, and *Dillon III* is that a conviction supported by other strong evidence will not be reversed even if accomplice testimony was erroneously admitted.

Here, the evidence against appellant, exclusive of evidence of his accomplice's guilty plea or of any evidence provided by his accomplice, was extremely strong. A quantity of insulated copper wire was reported stolen during one night; the next morning, an individual who had just purchased the same quantity of copper wire, with the insulation removed, identified appellant as the seller; the license plate of the vehicle in which the copper wire arrived at the purchaser's matched the license plate of appellant's brother's truck; and appellant's testimony as to where he obtained the wire he sold was refuted by witnesses. It is not reasonably possible that the jury would have reached a different verdict on appellant's guilt if it had not heard evidence of his accomplice's guilty plea.

Affirmed.