STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 5, 2013
v	No. 310076 Midland Circuit Court
JUSTEN ALAN EVANS, Defendant-Appellant.	LC No. 11-004930-FH

Before: HOEKSTRA, P.J., and RONAYNE KRAUSE and BOONSTRA, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction following a jury trial of receiving and concealing stolen property valued at $1,000 or more but less than $20,000, MCL 750.535(3)(a). The trial court sentenced defendant as a habitual offender, fourth offense, MCL 769.12, to serve 30 months to 20 years in prison, with credit for 194 days served. We affirm.

In June 2011, defendant and his co-defendant, Meggan Haught[1] shared an apartment with two other men, John Marble and Dan Sian. A house close to defendant's apartment was burglarized and police officers investigating the burglary quickly identified Marble and Sian as suspects in the burglary. Two officers went to the apartment and asked defendant and co-defendant whether any stolen or suspicious property was present in the apartment, which both repeatedly denied. A few days later, the investigating officers returned to the apartment and separately questioned defendant and co-defendant. When the officer questioning defendant mentioned that a paintball gun had been stolen, defendant stated that a paintball gun had unexpectedly appeared in his living room closet earlier that day. The officer asked co-defendant about the paintball gun, and co-defendant indicated "it's Justen's." Defendant, however, denied having any knowledge or ownership of the paintball gun. Defendant and co-defendant were eventually arrested and charged with receiving and concealing stolen property.

A jury trial was held for both defendants in front of one jury. At trial, Marble testified that at some point during the night of the burglary, defendant, co-defendant, and Sian entered the apartment with a duffel bag. Marble suspected that the three brought stolen property into the

[1] She was convicted of a misdemeanor at this trial and is not a party to this appeal.

apartment. He denied participating in the burglary. Marble's girlfriend testified that defendant told her that he sold some of the stolen property one or two days after the burglary.

Defendant argues that introduction of co-defendant's statement about the paintball gun ("it's Justen's") violated the rule of *Bruton v United States*, 391 US 123; 88 S Ct 1620; 20 L Ed 2d 476 (1968). Because defendant did not raise this argument at trial, we review the issue for plain error affecting substantial rights. *People v Pipes*, 475 Mich 267, 277-278; 715 NW2d 290 (2006).

"In *Bruton*, the United States Supreme Court held that a defendant is deprived of his Sixth Amendment confrontation rights when a nontestifying co-defendant's confession that inculpates the defendant is introduced at a joint trial." *Id.* at 269. *Bruton* explained that when a co-defendant's confession is only admissible against the co-defendant, instructing the jury to disregard the confession with respect to the defendant would not protect the defendant's right to a fair trial. *Bruton*, 391 US at 126; see also *Pipes*, 475 Mich at 275. Defendant argues that *Bruton* bars the admission of all testimonial statements[2] by non-testifying co-defendants in a joint trial. In addition to alleging *Bruton* error, defendant suggests that the admission of co-defendant's statement directly violated the Confrontation Clause. "The Confrontation Clause of the Sixth Amendment bars the admission of 'testimonial' statements of a witness who did not appear at trial, unless the witness was unavailable to testify and the defendant had a prior opportunity to cross-examine the witness." *People v Walker* (*On Remand*), 273 Mich App 56, 60-61; 728 NW2d 902 (2006). We find the co-defendants statement was testimonial and was a violation of the rule in *Bruton*.

However, our inquiry does not end with *Bruton*. Rather our Supreme Court has held that at this point in our analysis, we must weigh the evidence that was properly admitted against defendant, particularly defendant's self-incriminating statements to determine if reversal is warranted. *Pipes*, 475 Mich at 280. In this case, the stolen items were recovered during a search warrant for defendants' apartment. Defendant gave numerous and changing statements about the items, and there was testimony by one witness that defendant told the witness about the stolen items and that defendant indicated he had sold some of them. Defendant also indicated to the police officer that he had found the paintball gun in his closet. The evidence linking defendant to the stolen property is ample. Defendant was afforded a fair trial if all of the facts, evidence and circumstances are reviewed and considered in totality, rather than an exclusive focus on two words spoken by co-defendant. In light of the admissible evidence of guilt, the prejudicial effect posed by the *Bruton* error was minimal, and therefore the *Bruton* error was harmless. *Id*. at 283

Defendant alternatively argues that defense counsel was ineffective for failure to object to the admission of co-defendant's statement. Under the federal and state constitutions, a criminal defendant has the right to effective assistance of counsel. *People v Carbin*, 463 Mich 590, 599-

[2] "Statements are testimonial if the 'primary purpose' of the statements or the questioning that elicits them 'is to establish or prove past events potentially relevant to later criminal prosecution.'" *People v Garland*, 286 Mich App 1, 10; 777 NW2d 732 (2009), quoting *Davis v Washington*, 547 US 813, 822; 126 S Ct 2266; 165 L Ed 2d 224 (2006).

600; 623 NW2d 884 (2001), citing US Const, Am VI; Const 1963, art 1, § 20. "To establish ineffective assistance of counsel, a defendant must show (1) that the attorney's performance was objectively unreasonable in light of prevailing professional norms and (2) that, but for the attorney's error or errors, a different outcome reasonably would have resulted." *People v Werner*, 254 Mich App 528, 534; 659 NW2d 688 (2002). "A defendant must affirmatively demonstrate that counsel's performance was objectively unreasonable and so prejudicial as to deprive him of a fair trial." *Id*.

For the reasons explained above, admission of co-defendant's statement was harmless error. While defendant's counsel should have made such an objection, the fact that he did not was not so prejudicial as to deprive defendant of a fair trial and therefore, counsel was not ineffective. *Id.*

Next, defendant argues that the trial court erred in failing to give the accomplice jury instruction because the facts indicated that Marble was an accomplice. To preserve a challenge to jury instructions, a defendant must object to the jury instructions at trial, *People v McCrady*, 244 Mich App 27, 30; 624 NW2d 761 (2000), which defendant failed to do. When a defendant fails to request an accomplice instruction, the issue is reviewed for plain error affecting substantial rights. *People v Young*, 472 Mich 130, 132; 693 NW2d 801 (2005). Reversal may be warranted when resolution of the case "depends on a credibility contest between the defendant and the accomplice-witness." *People v Gonzalez*, 468 Mich 636, 643 n 5; 664 NW2d 159 (2003).

"CJI2d 5.5[2] defines 'accomplice' as a 'person who knowingly and willingly helps or cooperates with someone else in committing a crime.'" *People v Allen*, 201 Mich App 98, 105; 505 NW2d 869 (1993). To warrant an accomplice instruction, at least one party must present a theory that the witness was an accomplice. See *Id*. at 105. Further, the witness must be an accomplice with respect to the crime or crimes with which the defendant is charged. *People v Ho*, 231 Mich App 178, 189; 585 NW2d 357 (1998). The primary purpose of the accomplice instruction "is to raise the jury's awareness of the potential ulterior motives of the witness." *People v Lockett*, 295 Mich App 165, 186; 814 NW2d 295.

In this case, defendant and co-defendant were charged with receiving and concealing stolen property, which includes knowingly "possess[ing]" stolen property. MCL 750.535(1). Counsel for defendant and co-defendant suggested during cross-examination and in closing arguments that Marble participated in the burglary with Sian, notwithstanding his denials on the witness stand. Marble was extensively cross-examined and accused of being a liar with a bias during cross-examination. Other evidence in addition to the Marble testimony pointed to defendant's guilt, such as the stolen property recovered from his home, the changing stories to the police officer about the property and how it got to his apartment, and the statement previously discussed that defendant stated that he sold the items that had been stolen and not

found by the police. This is precisely the same situation as found in *People v Young*, *supra*. The law is clear that it is within the trial court's discretion to give the accomplice cautionary instruction or not. *Young*, 472 Mich at 143. In this case, the accomplice instructions, CJI2d 5.5 and 5.6, were not warranted. *Id*. No error having been shown with respect to the instructions, we necessarily reject defendant's assertion that his trial counsel was ineffective for failing to request the accomplice instructions. *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010).

Affirmed.

/s/ Joel P. Hoekstra
/s/ Amy Ronayne Krause

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BOONSTRA, J. (*concurring*).

I concur in the majority opinion, and write separately only to try to lend further clarity to the Confrontation Clause analysis.

Defendant argues that introduction of codefendant's statement about the paintball gun ("it's Justen's") violated the rule of *Bruton v United States*, 391 US 123; 88 S Ct 1620; 20 L Ed 2d 476 (1968). "In *Bruton*, the United States Supreme Court held that a defendant is deprived of his Sixth Amendment confrontation rights when a nontestifying codefendant's confession that inculpates the defendant is introduced at a joint trial." *People v Pipes*, 475 Mich 267, 269; 715 NW2d 290 (2006).

In addition to alleging *Bruton* error, defendant suggests that the admission of codefendant's statement directly violated the Confrontation Clause. "The Confrontation Clause of the Sixth Amendment bars the admission of 'testimonial' statements of a witness who did not appear at trial, unless the witness was unavailable to testify and the defendant had a prior opportunity to cross-examine the witness." *People v Walker* (*On Remand*), 273 Mich App 56, 60-61; 728 NW2d 902 (2006). See also *Crawford v Washington*, 541 US 36, 59, 68; 124 S Ct 1354; 158 L Ed 2d 177 (2004).

Blending these arguments, defendant contends that *Bruton* bars the admission of all testimonial statements by non-testifying codefendants in a joint trial. While I agree with the majority that a *Bruton* violation occurred in this case, I would reject defendant's effort to extend *Bruton* to bar the admission of all testimonial statements by non-testifying codefendants in a joint trial.

On its face, *Bruton* bars the admission of a non-testifying codefendant's "confession" where that confession also implicates the defendant. *Bruton*, 391 US at 126, 137. In this case,

codefendant's statement ("it's Justen's") was not a "confession" at all; to the contrary, it suggested non-involvement in the crime by codefendant, and served only to tie defendant to the stolen item. Therefore, the first question before us is whether *Bruton* applies at all in this case. I agree with the majority that it does, although in doing so I will endeavor to supply the missing link between the applicability of *Bruton* and the finding of a *Bruton* violation.

While the rule in *Bruton* has often been described as relating to the admission of a codefendant's "confession" (and indeed it was a "confession" that was at issue in *Bruton*), the Court in *Bruton* explained that its concern was not with whether the codefendant's statement confessed wrongdoing by the *codefendant*, but rather with the untested unreliability of a statement by the codefendant incriminating the *defendant*:

> [T]here are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored . . . . Such a context is presented here, where the powerfully incriminating extrajudicial statements of a codefendant, who stands accused side-by-side with the defendant, are deliberately spread before the jury in a joint trial. Not only are the incriminations devastating to the defendant but their credibility is inevitably suspect, a fact recognized when accomplices do take the stand and the jury is instructed to weigh their testimony carefully given the recognized motivation to shift blame onto others. The unreliability of such evidence is intolerably compounded when the alleged accomplice, as here, does not testify and cannot be tested by cross-examination. It was against such threats to a fair trial that the Confrontation Clause was directed. [*Bruton*, 391 US at 135-136 (citations and footnotes omitted)].

Our Michigan Supreme Court thus has described the "basic tenets of *Bruton*" as providing that "codefendant statements are 'inevitably suspect' because of the strong potential for blame shifting." *People v Banks*, 438 Mich 408, 420-421; 475 NW2d 769 (1991). The Court did so in the context of codefendant statements that were not incriminating of the codefendants themselves, but that were incriminating only of the defendant. Consequently, I conclude that *Bruton* applies not only to "confessions" of non-testifying codefendants, but to *statements* of codefendants that are incriminating of the defendant, without regard to whether they also implicate the codefendants in the crime.[1]

In this case, codefendant's statement ("it's Justen's") clearly and facially implicated defendant relative to his possession of the stolen property. Codefendant clearly was motivated to shift blame to defendant. Codefendant did not testify at trial, and could not be cross-examined.

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[1] In *Banks*, the Court addressed the applicability of *Bruton* to codefendant statements that were redacted to eliminate references to the defendant. See also *Richardson v Marsh*, 481 US 200; 107 S Ct 1702; 95 LEd2d 176 (1987), We need not address that issue in this case, however, as there apparently was no effort to redact references to defendant prior to the admission of codefendant's statement ("it's Justen's").

Under these circumstances, the admission of codefendant's statement incriminating defendant constituted a *Bruton* violation. However, the reason that there was a *Bruton* violation was not simply because the statement was "testimonial," as the majority suggests, but rather because it was a statement of the codefendant that implicated defendant, where the codefendant could not be cross-examined.[2]

I also would find that the admission of codefendant's statement did not violate the Confrontation Clause or the rule of *Crawford*, 541 US at 59 n 9. The majority does not find any such violation either, but the majority does not address this issue beyond its *Bruton* analysis. Because I believe that the two prongs of the analysis are separate, and in order to make explicit what is perhaps implicit in the majority's analysis, my further *Crawford* analysis follows.

"The Confrontation Clause of the Sixth Amendment bars the admission of 'testimonial' statements of a witness who did not appear at trial, unless the witness was unavailable to testify and the defendant had a prior opportunity to cross-examine the witness." *People v Walker* (*On Remand*), 273 Mich App 56, 60-61; 728 NW2d 902 (2006), citing *Crawford*, 541 US at 59, 68. However, "the Confrontation 'Clause does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted.'" *People v McPherson*, 263 Mich App 124, 133; 687 NW2d 370 (2004), quoting *Crawford*, 541 US at 59 n 9; see also *People v Chambers*, 277 Mich App 1, 10-11; 742 NW2d 610 (2007).

Codefendant's statement was clearly testimonial because it was given in response to police questioning. *Garland*, 286 Mich App at 10; *Washington*, 547 US at 822. However, the statement was not offered to prove its truth and therefore advance the prosecution's theory of the case against defendant, but rather to prove its falsity and therefore implicate codefendant's credibility. Using codefendant's statement in this manner does not implicate the Confrontation Clause. See *Crawford*, 541 US at 59 n 9; see also *Chambers* 277 Mich App at 10-11.

For these additional and clarifying reasons, I concur in the majority opinion.

/s/ Mark T. Boonstra

[2] For the reasons noted by the majority, I agree that the *Bruton* error was harmless.