FILED BY CLERK
JUL 16 2013
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. BLANCA SUSANA CORDOVA, Appellant.	2 CA-CR 2012-0286 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20060752

Honorable Richard S. Fields, Judge

AFFIRMED

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M I L L E R, Judge.

¶1 Blanca Cordova appeals her conviction and sentence for possession of marijuana. Cordova argues the trial court erred in precluding testimony of third-party culpability. Finding no error, we affirm the conviction and sentence.

Factual and Procedural Background

¶2 We view the evidence in the light most favorable to sustaining the jury's verdict. *State v. Haight-Gyuro*, 218 Ariz. 356, ¶ 2, 186 P.3d 33, 34 (App. 2008). In February 2006, a Pima County Sheriff's deputy stopped a vehicle for speeding. When the vehicle stopped, two men—the driver and a back-seat passenger—ran away. The deputy found Cordova in the car, trying to move over to the driver's seat from the passenger seat.

¶3 A "very strong" odor of fresh marijuana came from inside the vehicle. In the back seat, the deputy found a large tape-covered cardboard box filled with marijuana, a "basketball size" bundle of marijuana covered in plastic wrap and tape, a white trash bag containing marijuana, and Cordova's purse. In the glove compartment, the deputy found a roll of packing tape that appeared to match the tape on the box and bundle. The box, bundle, and trash bag contained a total of thirty-two pounds of marijuana. The deputy arrested Cordova, who initially gave him a false name and said she had just met the two men, who were giving her a ride to Phoenix. Cordova's mother eventually was identified as the owner of the vehicle.

¶4 Cordova was charged with possession of marijuana for sale, transportation of marijuana for sale, and possession of drug paraphernalia. At the first trial in 2006, the

trial court dismissed the possession for sale count, and Cordova was tried in absentia and convicted on the remaining charges; she was arrested in 2010 and sentenced to concurrent prison terms, the longest of which was three years. Cordova appealed, but a portion of the trial transcripts was lost. After the trial court determined the record was incapable of reconstruction and set aside the conviction and sentence, we dismissed the appeal. The state retried Cordova on the transportation and paraphernalia counts. At the second trial, the jury found her not guilty on the paraphernalia count but on the transportation count the jury found her guilty of the lesser-included offense of possession of marijuana. Cordova was sentenced to time served, 780 days, and this appeal followed.

Discussion

¶5 Cordova principally contends the trial court erred in precluding evidence of third-party culpability "thus depriving her of her constitutional rights to present a complete defense." The proffered evidence was testimony from her cousin, V.M., that the driver had said Cordova had nothing to do with the marijuana, presumably because it belonged to him. The driver, D.M., was in custody but refused to testify.

¶6 We review evidentiary rulings for a clear abuse of discretion unless they are based on constitutional law, in which case they are reviewed de novo. *State v. Armstrong*, 218 Ariz. 451, ¶ 20, 189 P.3d 378, 385 (2008). The constitutions of the United States and Arizona guarantee criminal defendants the opportunity to present a complete defense. *Crane v. Kentucky*, 476 U.S. 683, 690 (1986); Ariz. Const. art. II, § 24. Within this guarantee, "[f]ew rights are more fundamental than that of the accused

to present witnesses in his own defense." *Chambers v. Mississippi*, 410 U.S. 284, 302 (1966); *see also State v. Oliver*, 158 Ariz. 22, 30, 760 P.2d 1071, 1079 (1988). To exercise this right, a defendant must comply with the rules of evidence, but those rules must "not be applied mechanistically" such that a defendant is denied a fair trial. *Chambers*, 410 U.S. at 302.

¶7 The state moved before trial to preclude V.M. from testifying. The parties' arguments were based on the transcript from a telephonic interview of V.M. conducted by counsel. V.M. told the attorneys she had visited D.M. in jail two years earlier. The purpose of the visit was to talk about Cordova and get D.M. to "tell the truth . . . so [Cordova] can come out of jail . . . and get . . . her kids back." She said she told D.M. to "say the truth and just make a letter or a statement saying that she had nothing to do with those drugs in the car and that she didn't even know that they were in there," and D.M. answered "he would do it . . . if she would give . . . their son to [D.M.'s] wife."[1] Asked to give more details, V.M. then stated,

> I told him, you know, why don't you make . . . a written statement saying that she had nothing to do with it. And . . . he said . . . because he wants his kid to stay with his family . . . that he would make the written statement if she was to (inaudible) rights to his family . . . . [O]ther than that he wasn't going to confess."

The trial court granted the motion to preclude, stating that it did not find the statements reliable.

[1]According to V.M., Cordova and D.M. had a son together after the arrest.

¶8 We first address Cordova's argument that V.M.'s testimony was about inculpatory statements made by D.M. V.M. never stated that D.M. confessed to possessing or controlling the marijuana. For example, during the interview, state's counsel sought to clarify what D.M. had told V.M., asking, "[D]id he ever call it drugs or marijuana or . . . did he clarify that they were his? That she wasn't involved?" V.M. answered, "[I]t's hard to remember . . . basically he was responding to what I was telling him." D.M.'s statements were not inculpatory as to him.

¶9 The statements also did not exculpate Cordova.[2] Cordova testified that she did not know about the marijuana. Although V.M's testimony about D.M.'s statements would have corroborated this lack of information, they are, at best, conclusory. According to V.M., D.M. said Cordova did not know about the marijuana—D.M. did not say he did not tell Cordova about the marijuana.

¶10 Finally, V.M. acknowledged that her purpose in visiting D.M. was to get him to say the marijuana did not belong to Cordova. Even viewed in a light most favorable to Cordova, D.M. was only willing to discuss his role if he could advance his interests in the child custody negotiations.

¶11 The probative value of the proffered testimony was not of constitutional dimensions. For instance, in *Chambers*, the third party confessed soon after the crime,

[2]The state principally argues on appeal that Cordova waived her argument regarding the hearsay statements by focusing on D.M.'s statement instead of V.M.'s own reliability, contending the trial court found V.M. unreliable, not the hearsay statement. It also argues the effect of accomplice liability. For the reasons given, it is not necessary to address the state's response in view of our conclusion about the exculpatory nature of the statements.

and the confession was corroborated by eyewitness testimony and circumstantial evidence. *Id*. at 300. The third party also made a written confession, later repudiated, that would have exculpated the defendant of murder. *Id*. at 288. At the time, Mississippi's statement against interest exception was limited to pecuniary interests, so the trial court precluded it. *Id*. at 299. The Supreme Court held that the testimony "bore persuasive assurances of trustworthiness," and should have been admitted to allow the defendant to present a complete defense, even though there was no applicable hearsay exception. *Id*. at 302. In other words, the defendant in *Chambers* was precluded from making a complete defense to the murder because the state rule on admission against interest was unusually narrow. There are no similar circumstances here. D.M. never made an inculpatory statement that would exculpate Cordova, and the preclusion of V.M.'s testimony did not deny Cordova the right to a fair trial under the Due Process Clause.

¶12 Cordova also contends, albeit less directly, that V.M.'s testimony should have been admitted pursuant to Rule 804(b)(3). We review this claim of error under the abuse of discretion standard. Rule 804(b)(3) provides that an out-of-court statement "tending to expose the declarant to criminal liability" may be admitted if three requirements are met: (1) the declarant is unavailable; (2) the statement is against the declarant's interests; and (3) "corroborating circumstances clearly . . . indicate the trustworthiness of the statement." *State v. LaGrand*, 153 Ariz. 21, 27-28, 734 P.2d 563,

569-70 (1987); *see also* Ariz. R. Evid. 804(b)(3). We conclude that the trial court did not abuse its discretion in finding that Cordova failed to meet these requirements.

¶13 The first requirement was met because D.M. was "unavailable" for purposes of Rule 804(b)(3), as a declarant who asserted his privilege against self-incrimination. *LaGrand*, 153 Ariz. at 27, 734 P.2d at 569; *see also* Ariz. R. Evid. 804(a)(1). Cordova's counsel represented that they had discussed the situation with D.M.'s attorneys, who said they had advised him to invoke his rights and not cooperate without an immunity agreement. Even without a formal assertion, D.M. is "unavailable" for purposes of the hearsay exception. *See LaGrand*, 153 Ariz. at 27, 734 P.2d at 569 ("A declarant need not expressly assert the privilege if his unavailability is 'patent' and assertion of the privilege is a mere formality.").

¶14 The second requirement is that the statement against interest subject the declarant to criminal liability such that "a reasonable person in the declarant's position would have made [the statement] only if the person believed it to be true." Ariz. R. Evid. 804(b)(3)(A). An explicit confession is not required, and determination of whether each statement is truly against interest is a "fact-intensive inquiry of the surrounding circumstances." *State v. Nieto*, 186 Ariz. 449, 455, 924 P.2d 453, 459 (App. 1996). Further, when statements contain both inculpatory and exculpatory parts, Rule 804(b)(3) "'does not allow admission of non-self-inculpatory statements, even if they are made within a broader narrative that is generally self-inculpatory.'" *Id.*, *quoting Williamson v. United States*, 512 U.S. 594, 600-01 (1994).

¶15 As noted above, the statements that Cordova was not involved and did not know about the drugs do not inculpate D.M. Instead, they only express D.M.'s opinion. Even viewed in the context of the entire transcript, they do not inculpate D.M. because they do not provide any details of the crime or otherwise link D.M. to it. *See Williamson*, 512 U.S. at 603 (neutral statements may be inculpatory if they link declarant to crime or provide police significant details of crime); *see also LaGrand v. Stewart*, 133 F.3d 1253, 1267-68 (9th Cir. 1998) (statement that declarant's brother "did not stab anyone" not admissible as inculpatory despite being coupled with statement that declarant did stab victim).

¶16 Likewise, the statement that D.M. would confess if his then-wife received custody of his son is not a statement against interest. In *State v. Fisher*, 141 Ariz. 227, 235, 242-45, 686 P.2d 750, 765-68 (1984), the defendant sought to admit his wife's letters as statements against interest. In one of the letters, the wife wrote, "If, for any reason, I have to take the stand, I will confess, because I've already told you, I love you." *Id*. at 245. Our supreme court concluded the statement was not against interest because the wife did not say she committed the crime, but merely said she would confess because she loved him. *Id*. Here, D.M.'s statement is not that he committed any crime, rather, he simply said he would confess in exchange for custody of his son. It is not a statement against interest. Because none of D.M.'s statements qualifies as a statement against interest, the trial court did not err in refusing to allow V.M. to testify about them pursuant to Rule 804(b)(3).

Disposition

¶17 The conviction and sentence are affirmed.

/s/ Michael Miller
MICHAEL MILLER, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge