STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JUSTEN ALAN EVANS,

Defendant-Appellant.

UNPUBLISHED
November 5, 2013

No. 310076
Midland Circuit Court
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-

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[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