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2012 IL App (4th) 110457-U

NO. 4-11-0457

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
October 12, 2012
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Livingston County
TALIA FONCE,	)	No. 10CF200
Defendant-Appellant.	)	
	)	Honorable
	)	Jennifer H. Bauknecht,
	)	Judge Presiding.

JUSTICE STEIGMANN delivered the judgment of the court.
Presiding Justice Turner concurred in the judgment.
Justice Appleton dissented.

ORDER

¶ 1 *Held:* The appellate court affirmed, concluding that (1) the trial court did not err by admitting a video recording in which the defendant's boyfriend, while soliciting an undercover police officer to kill his ex-wife, stated that defendant also wanted the ex-wife killed and (2) defendant forfeited her claim that the trial court abused its discretion by sentencing her to 35 years in prison.

¶ 2 Following a November 2010 trial, a jury found defendant, Talia Fonce, guilty of solicitation of murder for hire (720 ILCS 5/8-1.2(a) (West 2010)). In January 2011, the trial court sentenced defendant to 35 years in prison.

¶ 3 Defendant appeals, arguing that the trial court (1) erred by admitting a video recording in which defendant's codefendant, her boyfriend, who was also convicted of solicitation of murder for hire, stated that defendant wanted his ex-wife to be killed, and (2) abused its discretion by sentencing defendant to 35 years in prison. We disagree and affirm.

¶ 4 I. BACKGROUND

¶ 5 In July 2010, the State charged defendant with solicitation of murder for hire, a Class X felony punishable by 20 to 40 years in prison. 720 ILCS 5/8-1.2(a), (b) (West 2010). In November 2010, defendant's jury trial commenced.

¶ 6 Shelley Fieldman testified that she and defendant's boyfriend, Shan Fieldman, divorced in 2002. Several years later, Shelley sued for approximately $30,000 in unpaid child support, and Shan became angry.

¶ 7 Clydie McBride testified that she and defendant had been "real good friends for awhile." In July 2010, Clydie, Heather Sanders, and Trina Bennett were all at Trina's home when Shan and defendant visited and started "talking about how they wanted to get rid of [Shan's] old lady." Defendant stated several times that she was "looking for somebody to kill the bitch." Defendant also indicated that she had recently sold her car for $1,500 and intended to use the money to have Shelley killed.

¶ 8 According to Trina, defendant asked her to refer them to someone who could kill Shelley, explaining to Trina that it "had to be done quick." Trina and defendant had been friends for a long time, and defendant knew about Trina's "past criminal conduct." Shan offered to pay $10,000 to have Shelley killed. Defendant told Trina that she had sold her car to raise some money in that pursuit. Trina agreed to find someone to kill Shelley because she "felt like [Shan and defendant] were so serious about committing these murders" that Trina wanted to prolong their looking for someone to do the killing while she contacted the police. After this initial discussion, defendant called Trina often, asking whether she had found someone to kill Shelley.

¶ 9 The morning after the initial discussion, Shan and defendant returned to Trina's home. Heather testified that Shan and defendant again spoke about having Shelley killed, this time indicating they "didn't care" if Shan's kids were present and, if they were, "they [could] be killed, too." At that point, Heather, Clydie, and Trina decided to contact the police. They met with the Illinois State Police later that day. The next day, Trina, wearing an eavesdropping device, arranged to meet with Shan at a Wal-Mart parking lot, where she introduced him to Sergeant Earl Candler, a police officer who was posing as a hitman.

¶ 10 Over defense counsel's objection on confrontation-clause grounds, the trial court allowed the State to play a video recording of the meeting between Candler and Shan. The recording, taken from a camera mounted in the backseat of Candler's car, showed Shan (1) soliciting Candler to kill Shelley and, if necessary, Shelley's boyfriend; (2) discussing the details of the killing; and (3) giving Candler $100 and a note for an additional $7,400. At one point, the recording also shows Shan using chewing tobacco and Candler telling him it is a "nasty habit." Shan responded that he knew that, explaining that his "old lady" complains about it now. Candler said, "What, you got an old lady now?" to which Shan replied that he was engaged. Candler then asked, "She know about this?" and Shan answered, "Yes. She wants it just as badly as I do. She's a bitch. Yes, she knows about this." Shan then explained to Candler that defendant was angry when she found out about Shan's meeting with Candler because she could have saved her taxes and used them to kill Shelley.

¶ 11 Defendant then testified on her own behalf, asserting that, although Shan talked about killing his ex-wife, she did not believe he was serious. She denied participating in a conversation with Trina about hiring someone to kill Shelley. According to defendant, Shan told

her about his discussion with Trina, Clydie, and Heather after they left Trina's home, and defendant told Shan that she "would not agree with that."

¶ 12 On this evidence, the jury found defendant guilty of solicitation of murder for hire.

¶ 13 In January 2011, defendant filed a motion for new trial, arguing, in pertinent part, that the trial court erred by admitting into evidence the video recording of Shan's meeting with Candler because it constituted testimonial hearsay that violated defendant's sixth amendment right to confront witnesses against her. At a hearing later that month, the court denied defendant's motion and proceeded to sentencing. The court admitted victim impact statements from Shelley, one of the couple's children, and Shelley's parents. The court also admitted statements in mitigation from community members and allowed defendant to make a statement in allocution. Following arguments, the court stated as follows:

¶ 14 "I also have to take into consideration the evidence that was received at trial and the impact statements from the victims, victim and her family I guess. *** Despite what I would say is probably an unstable upbringing or maybe not the greatest upbringing, *** [defendant] seemed to have become a productive member of this community. She maintained a home. She raised her children. Volunteered in her children's classrooms. Volunteered in the food pantry. Was active in her church. So by all measures, I think she was a productive member."

The court also noted that defendant's criminal record was "not that bad." However, the court

found that defendant was "actively involved in this plot" and had "hooked up" Shan with people that could contact somebody to kill Shelley. Reasoning that "deterrence is a very strong factor," the court stated that "there are a lot of people in this community, not just the victims here, that sleep a little bit less or lost some sleep over this crime that affected our community." The court further noted that defendant's "conduct threatened very serious harm."

¶ 15 The trial court thereafter sentenced defendant to 35 years in prison.

¶ 16 In February 2011, defendant filed a motion to reconsider sentence, asserting that her sentence was excessive "in that there would be an inequitable disparity between [her] sentence and that of the codefendant." Specifically, the motion contended that defendant's codefendant, Shan, had been charged with two separate counts of solicitation of murder for hire (one count for Shelley, and one count for Shelley's boyfriend). Although Shan had not yet been tried, he faced a total of 40 years for both counts—only 5 more years than defendant received for one count of solicitation of murder for hire. Defendant's motion alleged the disparity between defendant's sentence and Shan's sentence was inequitable because Shan "made the actual arrangements for the murders" and induced the criminal conduct of defendant.

¶ 17 Following a June 2011 hearing, the trial court denied defendant's motion.

¶ 18 This appeal followed.

¶ 19 II. ANALYSIS

¶ 20 Defendant argues that the trial court (1) erred by admitting a video recording in which defendant's codefendant boyfriend, who was also convicted of solicitation of murder for hire, stated that defendant wanted his ex-wife to be killed and (2) abused its discretion by sentencing defendant to 35 years in prison. We address defendant's contentions in turn.

¶ 21 A. The Trial Court Did Not Err by Admitting the Video Recording

¶ 22 Defendant first contends that the trial court erred by admitting the video recording of the conversation between Shan and Candler in which Shan told Candler that defendant wanted his ex-wife to be killed. Specifically, defendant contends the admission of the video violated her sixth amendment right to confront witnesses against her because Shan's statement did not fall within the coconspirator exception to the proscription against hearsay.

¶ 23 We review the trial court's admission of Shan's statement for an abuse of discretion. See *People v. Leak*, 398 Ill. App. 3d 798, 824, 925 N.E.2d 264, 287 (2010) ("The admission of evidence lies within the sound discretion of the trial court, and a reviewing court will review the trial court's ruling only for an abuse of discretion.").

¶ 24 The sixth amendment provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right *** to be confronted with the witnesses against him." U.S. Const., amend. VI. In *Crawford v. Washington*, 541 U.S. 36, 50, 124 S. Ct. 1354, 1363 (2004), the Supreme Court concluded that one of the "principal" evils at which the confrontation clause was directed was the "use of *ex parte* examinations as evidence against the accused." Accordingly, the Supreme Court concluded that "testimonial" out-of-court statements are admissible only where (1) the declarant is unavailable, and (2) the defendant has had a prior opportunity to cross-examine the declarant. *Crawford*, 541 U.S. at 53-54, 124 S. Ct. at 1365. The Supreme Court did not explicitly define "testimonial," but provided two examples of "testimonial" statements: (1) *ex parte* testimony at a preliminary hearing, and (2) statements taken by police officers in the course of interrogations. *Crawford*, 541 U.S. at 51-52, 124 S. Ct. at 1364. The Supreme Court made clear, however, that not all hearsay statements are "testimonial," asserting that "[m]ost of

the hearsay exceptions" cover "statements that by their nature [are] not testimonial—for example, business records or statements in furtherance of a conspiracy." *Crawford*, 541 U.S. at 56, 124 S. Ct. at 1367.

¶ 25 Thus, pursuant to *Crawford*, defendant's confrontation clause claim turns on whether Shan's statement falls into the coconspirator exception. *People v. Cook*, 352 Ill. App. 3d 108, 124, 815 N.E.2d 879, 893 (2004) ("[I]f the statements in question qualify as coconspirator statements, the rule announced in *Crawford* does not apply to bar their admission."). Under the coconspirator exception, " 'any act or declaration (1) by a coconspirator of a party, (2) committed in furtherance of the conspiracy, and (3) during its pendency is admissible against each and every coconspirator, provided that (4) a foundation for its reception is laid by independent proof of the conspiracy.' " *People v. Coleman*, 399 Ill. App. 3d 1198, 1202-1203, 931 N.E.2d 268, 271 (2010) (quoting *People v. Childrous*, 196 Ill. App. 3d 38, 51, 552 N.E.2d 1252, 1261 (1990)).

¶ 26 Here, defendant does not claim that she and Shan were not coconspirators. Rather, defendant's sole contention is that Shan did not make his statement "in furtherance of the conspiracy" because Candler elicited Shan's statement. We are not persuaded.

¶ 27 "Statements made in furtherance of a conspiracy include those that have the effect of advising, encouraging, aiding or abetting its perpetration." *People v. Kliner*, 185 Ill. 2d 81, 141, 705 N.E.2d 850, 881 (1998). As the State points out, a reasonable inference from Shan's telling Candler that defendant wanted Shelly killed "just as badly" as Shan did is that Shan intended to (1) reassure Candler about his ability to afford payment and (2) instill confidence in Candler that defendant would not interfere with the plan to kill Shelley. Both statements would have had the effect of furthering the parties' conspiracy.

¶ 28 Because we find that Shan's statement falls within the coconspirator exception, we conclude that the trial court did not abuse its discretion by admitting the statement.

¶ 29 B. Defendant Has Forfeited Her Challenge to Her 35-Year Sentence

¶ 30 Defendant next contends that the trial court abused its discretion by sentencing her to 35 years in prison because the court (1) did not properly consider her rehabilitative potential and minimal criminal history, (2) relied on an aggravating factor that was unsupported by the evidence, (3) considered four victim impact statements even though the offense did not have a victim, and (4) did not consider the "less serious nature of this offense" as established by the trial evidence. We need not address defendant's contentions on the merits, however, because we conclude that defendant has forfeited them by failing to raise them in her motion to reconsider sentence.

¶ 31 As we pointed out in *People v. Rathbone*, 345 Ill. App. 3d 305, 308-10, 802 N.E.2d 333, 336-37 (2003), and its progeny, the Unified Code of Corrections (Unified Code) requires a defendant to include any challenge to his sentence in a written motion filed within 30 days of the imposition of sentence. See *People v. Montgomery*, 373 Ill. App. 3d 1104, 1123, 872 N.E.2d 403, 419 (2007); *People v. Ahlers*, 402 Ill. App. 3d 726, 731-32, 931 N.E.2d 1249, 1254 (2010) (referencing 730 ILCS 5/5-8-1(c) (West 2004), now 730 ILCS 5/5-4.5-50(d) (West 2008), incorporating amendments of Pub. Act 95-1052, § 5 (eff. July 1, 2009) (2008 Ill. Laws 4204, 4212-13)). Such a motion allows the trial court to answer the defendant's claim "by either (1) acknowledging its mistake and correcting the sentence, or (2) explaining that the court did not improperly sentence [the] defendant." *Rathbone*, 345 Ill. App. 3d at 310, 802 N.E.2d at 337.

¶ 32 As previously explained, defendant's motion to reduce sentence challenged only

the disparity of her sentence and that of her codefendant as follows:

¶ 33 "Defendant submits that the sentence is excessive in that there would be an equitable disparity between [her] sentence and that of the co-defendant."

¶ 34 The motion then explained that defendant's codefendant, Shan, had been charged with two counts of solicitation of murder for hire but only faced a prison sentence of 40 years for both counts. The motion further alleged that "Co-defendant [was] the individual who made the actual arrangements for the murders with the undercover officer," and "Defendant's criminal conduct was induced by the co-defendant."

¶ 35 Now, for the first time, defendant claims that the trial court's sentence was excessive because the court (1) did not properly consider her rehabilitative potential and minimal criminal history, (2) relied on an aggravating factor that was unsupported by the evidence, (3) considered four victim impact statements even though the offense did not have a victim and (4) did not consider the "less serious nature of this offense" as established by the trial evidence. For the reasons we have outlined repeatedly beginning with *Rathbone,* defendant has forfeited these claims.

¶ 36 Moreover, we decline to apply plain-error review to address defendant's claim because defendant has not urged us to do so. See *People v. Hillier*, 237 Ill. 2d 539, 545, 931 N.E.2d 1184, 1188 (2010) ("A defendant who fails to argue for plain-error review obviously cannot meet his burden of persuasion."). Thus, we honor defendant's procedural default.

¶ 37 III. CONCLUSION

¶ 38 For the reasons stated, we affirm the trial court's judgment. As part of our

judgment, we award the State its $50 statutory assessment against defendant as costs of this appeal.

¶ 39 Affirmed.

¶ 40 JUSTICE APPLETON, dissenting.

¶ 41 I respectfully dissent from the majority's decision because I am convinced that the portion of the videotaped recording where Fieldman, in response to Candler's question whether defendant knew about Fieldman soliciting his ex-wife's murder and Fieldman states that yes, defendant also wanted her killed, was inadmissible hearsay and a violation of defendant's sixth amendment right to confront witnesses against her.

¶ 42 I agree that the general rule is that a statement of one coconspirator is admissible against the others as an admission if the statement was made during the course of, and in furtherance of, the conspiracy. *People v. Byron*, 164 Ill. 2d 279, 290 (1995). However, in my view, the majority errs by finding the statement at issue in this case was made in furtherance of the conspiracy. Rather, I find Fieldman's statement that defendant wanted his ex-wife killed "just as badly" as he did was a statement that can be characterized only as one inculpating defendant by a nontestifying codefendant. As our supreme court stated, " '[i]t would be difficult to imagine any evidence that would be more prejudicial.' " *People v. Hernandez*, 121 Ill. 2d 293, 318 (1988) (quoting *People v. Buckminster*, 274 Ill. 435, 448 (1916)).

¶ 43 Fieldman's statement to Candler was not evidence sufficient and substantial enough to except the statement as admissible hearsay. See *People v. Coleman*, 399 Ill. App. 3d 1198, 1203 (2010). To establish a conspiracy, there must be an *agreement* to accomplish a criminal goal. See *People v. Duckworth*, 180 Ill. App. 3d 792, 795 (1989). This statement was not evidence of an agreement between Fieldman and defendant. It was merely Fieldman advising Candler that defendant felt it would be nice, as did he, if Fieldman's ex-wife was dead. That does not qualify as a conspiracy, let alone does it further the conspiracy. Accordingly, the statement

should not have been admitted. See *Duckworth*, 180 Ill. App. 3d at 795.

¶ 44 I believe defendant's right to confront witnesses against her was violated in this case by allowing into evidence the hearsay statement from the recording—a statement which inculpated her in the crime. This, in my opinion, constitutes reversible error and, accordingly, defendant should be entitled to a new trial.