

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LISA ANN DOLPH-HOSTETTER,

Defendant-Appellant.

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UNPUBLISHED

April 3, 2007

No. 262858

St. Joseph Circuit Court

LC No. 00-010340-FC

Before: O’Connell, P.J., and White and Markey, JJ.

PER CURIAM.

A jury convicted defendant of conspiracy to commit second-degree murder, MCL 750.157a, and second-degree murder, MCL 750.317. She was sentenced to concurrent prison terms of 25 to 50 years for each conviction. She appeals by right. We affirm defendant’s second-degree murder conviction, vacate the conspiracy conviction, and remand for resentencing.<sup>1</sup>

Defendant first argues that the trial court abused its discretion and violated her constitutional right of confrontation when it admitted prior testimony from witness Rosalie Bowersox which was given at an earlier coroner’s inquest proceeding. The trial court allowed the testimony after Bowersox testified at trial that because of health problems, she was unable to remember the events that were the subject of her prior testimony.

We review a trial court’s decision to admit evidence for an abuse of discretion. *People v Jones*, 240 Mich App 704, 706; 613 NW2d 411 (2000). We review de novo constitutional questions. *People v Herron*, 464 Mich 593, 599; 628 NW2d 528 (2001).

Although defendant argues that Bowersox’s prior testimony was inadmissible hearsay, a statement is not hearsay if “[t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . inconsistent with the declarant’s testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding[.]” MRE 801(d)(1)(A).

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<sup>1</sup> This Court’s prior decision in *People v Dolph-Hostetter*, 256 Mich App 587, 589-590; 664 NW2d 254 (2003), contains a summary of the factual background of this case.

Bowersox's prior testimony was inconsistent with her testimony at trial because Bowersox testified that she did not remember the events that were the subject of her prior testimony. *People v Chavies*, 234 Mich App 274, 282-283; 593 NW2d 655 (1999), overruled on other grounds *People v Williams*, 475 Mich 245, 255; 716 NW2d 208 (2006). The *Chavies* Court adopted the long-standing interpretation by federal courts of FRE 801(d)(1)(A) that an inconsistency of a previous statement is not limited to diametrically opposed answers but may be found in evasive answers, inability to recall, silence, or changes of position. Here, the prior testimony was given at a coroner's inquest under oath subject to the penalty of perjury. MCL 773.5; MCL 750.423. Finally, Bowersox testified at trial and was subject to cross-examination concerning the prior testimony. Therefore, it was properly admitted under MRE 801(d)(1)(A).

We disagree with defendant's argument that her right of confrontation was violated because Bowersox claimed at trial that she could not remember anything. This Court rejected a similar argument in *Chavies*, *supra* at 283, citing *United States v Owens*, 484 US 554, 559; 108 S Ct 838; 98 L Ed 2d 951 (1988), and explaining "when witnesses are present at trial and could be cross-examined about their statements—even though they claim to remember nothing—the witnesses are 'available' for cross-examination within the meaning of the Confrontation Clause." See also *People v Stanaway*, 446 Mich 643, 694 n 53; 521 NW2d 557 (1994); *People v Watson*, 245 Mich App 572, 584; 629 NW2d 411 (2001). "Although a defendant must be given the opportunity for cross-examination, the defendant has no constitutional right to an effective or successful cross-examination. Thus, a defendant's right of confrontation is not denied even if the witness, on cross-examination, claims a lack of memory." *Id.* (citation omitted).

Defendant argues that the holding in *Chavies* is no longer valid in light of *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004). We disagree. "In *Crawford* . . . the United States Supreme Court held that, under the Confrontation Clause of the Sixth Amendment, testimonial statements of witnesses absent from trial may not be admitted against a criminal defendant unless the declarant is unavailable and the defendant has had a prior opportunity to cross-examine the declarant." *People v Shepherd*, 472 Mich 343, 347; 697 NW2d 144 (2005) (emphasis added). And, Justice Scalia in *Crawford* noted that, "when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements." *Crawford*, *supra* at 59 n 9, citing *California v Green*, 399 US 149, 162, 26 L Ed 2d 489, 90 S Ct 1930 (1970). Here, Bowersox testified at trial, and defendant had the opportunity to cross-examine her. Although Bowersox testified that she was not able to remember the earlier events, as previously discussed, she was still available for cross-examination within the meaning of the Confrontation Clause. Therefore, defendant's right of confrontation was not violated.

Defendant next argues that she was denied her right to effectively cross-examine another witness when the trial court prohibited her from eliciting that the witness had formerly acted as an informant in drug cases.

A trial court's decision to limit cross-examination is reviewed for an abuse of discretion. *People v Minor*, 213 Mich App 682, 684; 541 NW2d 576 (1995). Generally, "[a] limitation on cross-examination preventing a defendant from placing before the jury facts from which bias, prejudice, or lack of credibility of a prosecution witness might be inferred constitutes denial of the constitutional right of confrontation." *People v Cunningham*, 215 Mich App 652, 657; 546 NW2d 715 (1996). Nevertheless,

[t]he right of cross-examination is not without limit; neither the Confrontation Clause nor due process confers an unlimited right to admit all relevant evidence or cross-examine on any subject. The right of cross-examination does not include a right to cross-examine on irrelevant issues and may bow to accommodate other legitimate interests of the trial process or of society. “[T]rial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness’ safety, or interrogation that is repetitive or only marginally relevant.” Defendants are, however, guaranteed a reasonable opportunity to test the truth of a witness’ testimony. [*People v Adamski*, 198 Mich App 133, 138; 497 NW2d 546 (1993) (citations omitted).]

In this case, the prosecutor advised the trial court that the witness’s safety could be in jeopardy if information about her prior work as an informant was revealed. Defendant did not challenge or dispute this assertion. The trial court prohibited defendant from cross-examining the witness about her previous activities as an informant, but indicated that it would allow defendant to question the witness about her drug habit, previous convictions, the fact that she was in jail, and whether she might be trying to curry favor with her testimony or may have done so in the past. We conclude that the trial court did not abuse its discretion when it placed a reasonable limit on cross-examination for the safety of the witness, but also allowed defendant to question the witness about various other subjects relevant to her credibility as a witness.

Next, we agree with defendant that her conviction of conspiracy to commit second-degree murder must be vacated because no such crime exists. *People v Hammond*, 187 Mich App 105, 107-109; 466 NW2d 335 (1991). This state has no legitimate interest in securing a conviction for a nonexistent offense. *Id.* at 106-107.

We also agree that defendant is entitled to resentencing. Because the offenses were committed before January 1, 1999, the effective date of the statutory sentencing guidelines, MCL 769.34(1) and (2), the judicial guidelines apply. See Administrative Order No. 1998-4, 459 Mich clxxv. Our decision to vacate defendant’s conspiracy conviction affects the scoring of prior record variable 7 and reduces the guidelines range from 120 to 300 months, to 96 to 300 months. Although defendant’s sentence for second-degree murder is still within the reduced range, a sentence is invalid if it is based on either inaccurate information or a misconception of the law. *People v Miles*, 454 Mich 90, 96; 559 NW2d 299 (1997). Here, the trial court sentenced defendant under the inaccurate and erroneous misconception that she was properly convicted of conspiracy to commit second-degree murder. Under the circumstances, we must remand for resentencing on defendant’s second-degree murder conviction. *Id.*

In light of our decision to vacate defendant’s conspiracy conviction, we need not consider defendant’s double jeopardy argument. Furthermore, defendant’s claim that defense counsel was ineffective for failing to object to either the trial court’s instructions on conspiracy to commit second-degree murder or the jury’s verdict is moot. Because we are vacating the conspiracy conviction and remanding for resentencing, defendant cannot establish the necessary element of prejudice to prevail on a claim of ineffective assistance of counsel. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000).

We affirm in part, vacate in part, and remand for resentencing. We do not retain jurisdiction.

/s/ Peter D. O'Connell

/s/ Jane E. Markey